137-15

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 931.

FRANK MORRISSEY, PLAINTIFF IN ERROR,

vs.

MAJOR DAVID PERRY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 12, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 28, 1890.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the March term, 1889, thereof, between Frank Morrissey, petitioner, and Major David Perry, respondent, a manifest error hath happened, to the great damage of the said Frank Morrissey, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this tenth day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

Issued at office, in the city of St. Louis, with the seal of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, dated as aforesaid.

{ Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. }

A. P. SELBY,
Clerk Circuit Court United States, Eastern Division of the Eastern Judicial District of Missouri.

Allowed by—
AMOS M. THAYER, *Judge.*

Service of citation waived.

1½ [Endorsed:] No. 3025. United States circuit court, eastern division of the eastern judicial district of Missouri. *In re* Frank Morrissey, petitioner, *vs.* Major David Perry, respondent. Writ of error to the circuit court of the U. S., eastern division, eastern district of Missouri. Returned and filed tenth day of Sept'r, 1889. A. P. Selby, clerk.

Return to Writ.

UNITED STATES OF AMERICA, }
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In obedience to the command of the within writ I herewith trans-

mit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office, in the city of St. Louis, this seventh day of October, A. D. 1889.

{Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.}

A. P. SELBY,
Clerk of said Court.

2 The United States of America to Major David Perry, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, wherein Frank Morrissey is petitioner in error and you are respondent in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Amos M. Thayer, judge of the circuit court of the United States for the eastern district of Missouri, this tenth day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

AMOS M. THAYER,
Judge United States District Court, Eastern District of Missouri.

Service of citation waived.
GEO. D. REYNOLDS,
U. S. Att'y, East'n Dist. Mo.

[Endorsed:] No. 3025. United States circuit court, eastern division of the eastern judicial district of Missouri. *In re* Frank Morrissey, petitioner, *vs.* Major David Perry, respondent. Citation. Filed September 10, 1889. A. P. Selby, clerk.

3 UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In the Circuit Court of the United States in and for said Division of said Judicial District.

Be it remembered that on the ninth day of April, A. D. 1889, the following, among other, proceedings were had and appear of record in said court, to wit:

Petition for Writ of Habeas Corpus Filed.

In Re FRANK MORRISSEY, Petitioner. 3025. *Habeas Corpus.*

Now comes Frank Morrissey, by his attorney, and files his petition for a writ of *habeas corpus*, which being considered by the court it is ordered that a writ of *habeas corpus* issue, as in said petition prayed, returnable on Friday, April 12, 1889, at ten o'clock a. m.

Said petition for writ of *habeas corpus* is in words and figures following, to wit:

Petition for Writ of Habeas Corpus.

Circuit Court of the United States, Eastern Division, Eastern District of Missouri.

In Re FRANK MORRISSEY, Petitioner.

To the Honorable Amos M. Thayer, judge of the United States circuit court for the eastern district of Missouri:

The petitioner respectfully shows to your honor that he is now a prisoner unjustly and unlawfully detained and imprisoned in
4 the custody of Major David Perry (commanding officer of Jefferson Barracks, a recruiting and forwarding station of the United States Army, in St. Louis county, in the State of Missouri) in the guard-house of said Jefferson barracks.

Your petitioner also shows that such confinement is for a supposed desertion from the United States Army and by virtue of an arrest made under the following circumstances, to wit: Your petitioner, Frank Morrissey, was born at Billerica, in the State of Massachusetts, on August 13th, 1866. On or about August 23rd, 1883, being then 17 years of age, he attempted to enlist in the mounted service of the United States Army, at Washington, D. C. At the time of said attempt his mother was his only surviving parent and legal guardian, but his said parent and guardian did not prior nor subsequent to said attempt give her consent, either orally or in writing, to his enlistment, as is, in the case of minors, required by section 1117 of the Revised Statutes of the United States. Upon said attempted enlistment your petitioner was at once sent to Jefferson Barracks, Missouri, where, before he had been assigned to a regiment or regular duty, he repudiated said attempt to enlist and left the station, without consent, on or about September 13th, 1883, about three weeks after his attempted enlistment. In February of this year, 1889, he went to a recruiting station in Boston, Mass., and announced his identity, in order to receive a formal discharge on the ground of his minority at the time of his attempted enlistment. He was there arrested for desertion from the Army of the United States, was sent to Ft. Warren, Boston, then to Governor's Island, and is now at Jefferson Barracks, Mo., awaiting trial by court martial at said Jefferson Barracks.

Your petitioner further states that he is advised by counsel, Daniel

5 N. Kirby, and so believes that his said arrest and imprisonment are illegal, and that said illegality consists in these, among other, reasons, to wit:

1. Your petitioner alleges that said alleged enlistment was void and of no effect, because your petitioner was under twenty-one years of age and could not legally enlist without the consent of one of his parents, and because his enlistment had not been completed by assignment to a regiment, for which reasons your petitioner had not become a soldier and could not be guilty of the offence of desertion.

2. That said Frank Morrissey was not in actual service at the time of his alleged desertion.

3. That the statutory period of two years within which a man can be arrested for any military crime and tried by a court martial has passed.

4. That said Frank Morrissey is now wrongfully and illegally restrained of his liberty on the aforesaid charge of desertion.

5. That the said Frank Morrissey is not guilty of the offence of desertion aforesaid.

Wherefore, to be relieved of said unlawful detention and imprisonment, your petitioner prays that a writ of *habeas corpus*, to be directed to the said Major David Perry, commanding officer of Jefferson Barracks, Mo., may issue in this behalf, so that your petitioner may be forthwith brought before this court, to do, submit to, and receive what the law may require, and for such other relief as to your honor may seem meet, to the end that your petitioner may obtain his liberty.

FRANK MORRISSEY.

D. N. KIRBY AND
CHAS. NAGEL,
Att'ys for Petitioner.

6 UNITED STATES OF AMERICA,
Eastern District of Missouri, State of Missouri, } ss:
County of St. Louis,

APRIL 3RD, 1889.

Frank Morrissey, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and that the statements therein made he believes to be true.

FRANK MORRISSEY.

Subscribed and sworn to before me this 3rd day of April, 1889.
[SEAL.] B. J. CAFFREY,
Notary Public.

Term expires 27th Febr., 1893.

And thereupon there was issued in said cause a writ of *habeas corpus*, which, with the return of service thereon, is in words and figures following, to wit:

Writ of Habeas Corpus.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *sct:*

In the Circuit Court of the United States in and for the Eastern Division of said Judicial District.

The President of the United States of America to Major David Perry, the officer in command of Jefferson Barracks, Missouri, Greeting:

You are hereby commanded to have the body of Frank Morrissey, detained under your custody, as it is said, at Jefferson Barracks, Missouri, before the honorable circuit court of the United States in and for the eastern division of the eastern judicial district of
7 Missouri, at the Custom-House building, in the city of St. Louis, in said division of said district, on Friday, the twelfth day of April, A. D. 1889, at ten o'clock a. m. of said day, together with the time and cause of his detention, and without delay, then and there to do and receive what the said circuit court shall then and there consider concerning the said Frank Morrissey; hereof fail not.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the ninth day of April, A. D. eighteen hundred and eighty-nine.

[SEAL.] Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

A. P. SELBY, *Clerk,*
By GEO. F. HAID, *Deputy.*

Marshal's Return of Service.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

I hereby certify that I have executed this writ on the 10th day of April, A. D. 1889, by delivering a certified copy thereof, together with a copy of the petition in this cause as furnished by the clerk, to the within-named Major David Perry, at Jefferson Barracks, Mo., in the above-named district.

J. W. EMERSON,
U. S. Marshal,
By GEO. J. HAZLETT, *Deputy.*

1 service	2 00
10 mi. travel	60
	$2 60

And afterwards, to wit, on the 12th day of April, A. D. 1889, the following return to said writ was filed.

Return to Writ of Habeas Corpus.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } ss:

8 In the Circuit Court of the United States in and for the said Division of said District, at the March Term, A. D. 1889.

In the Matter of the Petition of FRANK MORRISSEY for a Writ of *Habeas Corpus.*

Now comes David Perry, major of the Sixth Regiment of United States Cavalry, commanding Jefferson Barracks, respondent in the above matter, by Thomas P. Bashaw, attorney of the United States for the eastern district of Missouri, and respectfully makes return to the annexed writ of *habeas corpus* and shows to the court that the within-named Frank Morrissey, on the 23rd day of August, A. D. 1883, enlisted in the Army of the United States for the mounted service, at the city of Washington, District of Columbia, according to the laws of the United States governing the recruiting service for enlisting recruits, and did then and there take the oath of enlistment and allegiance required by law for recruits, and also therein declared himself to be of the age of twenty-one years and five months, all of which will more fully appear by the original enlistment paper of the said Frank Morrissey, which is herewith submitted to the inspection of this honorable court, marked "Exhibit A," and for such purpose temporarily made a part of this return and a copy thereof annexed, marked "Exhibit B;" that said Frank Morrissey, pursuant to his said contract of enlistment, then and there entered into the military service of the said United States as a recruit and soldier of the mounted service in said army, and then and there accepted and drew from the United States a suit of cavalry uniform and equipments and sundry and divers articles of clothing and underwear and transportation from the said city of Washington to the said Jefferson Barracks, where he was ordered to report for duty
9 and drill as a recruit and where he arrived on the — day of August, A. D. 1883; that upon the arrival of said Frank Morrissey at said barracks he was put upon drill duty as a recruit and soldier of the mounted service of the Army of the United States and drew his rations, arms, equipments, and clothing as such, and continued in such service and pay until on or about the 13th day of September, A. D. 1883, when he left the said barracks without the knowledge or consent of the proper officer thereof or of any officer or soldier thereof and deserted from the Army of the United States, and remained away from the army and in concealment until after the expiration of the term of five years from and after the date of his said enlistment and until the — day of February, A. D. 1889, when he appeared at a recruiting office of the Army of the United States, at the city of Boston, in the State of Massachusetts, and demanded his discharge from said army, on the ground that he was a minor at the time of his said enlistment; that he was then and there placed

under arrest by the officer in command of said recruiting station upon the charge of desertion from the Army of the United States and was conveyed to Jefferson Barracks aforesaid, where he was confined at the time of the service of the writ herein upon respondent, who was then and there in command at said barracks; that a formal charge of desertion from the Army of the United States has been preferred against the said Frank Morrissey and is now pending, and he is awaiting trial thereon before a court martial, as in his petition alleged; that the said Frank Morrissey at the time of his said enlistment was accepted by the United States and mustered for pay as a duly enlisted, able-bodied soldier in the manner and mode provided by law and by the General Regulations for the Government of the Army of the United States.

And respondent, for further return, now produces and brings in court the body of said Frank Morrissey. Wherefore respondent prays that said writ of *habeas corpus* be dismissed and said petitioner remanded to the custody of respondent, and that respondent be discharged with his costs.

GEO. H. SANDS,
1st Lt 6th Cav'y,
For D. PERRY,
Major 6 Cav'y, Com'd'g Jefferson Barracks, Mo.

THE UNITED STATES OF AMERICA.

[Vignette.]

A true copy.

GEO. H. SANDS,
1st Lieut. 6th Cavalry, Depot Adjutant.

DIST. OF COLUMBIA, }
City or Town of Washington, } *ss.*:

I, Frank Morrissey, born in Billerica, in the State of Massachusetts, aged twenty-one years and five months, and by occupation a sailor, do hereby acknowledge to have voluntarily enlisted this twenty-third day of August, 1883, as a soldier in the Army of the United States of America for the period of five years, unless sooner discharged by proper authority, and do also agree to accept from the United States such bounty, pay, rations, and clothing as are or may be established by law; and I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Rules and Articles of War.

(Signed) FRANK MORRISSEY. [SEAL.]

Subscribed and duly sworn to before me this 23d day of August, A. D. 1883.

(Signed) WM. BAIRD,
1st Lieut. 6th Cavalry, Recruiting Officer.

I certify on honor that I have carefully examined the above-named man agreeably to the General Regulations of the Army, and that in my opinion he is free from all bodily defects and mental infirmity which would in any way disqualify him from performing the duties of a soldier.

(Signed) L. I. RADCLIFFE,
Act'g Ass't Surgeon U. S. A., Examining Officer.

I certify on honor that I have minutely inspected the above-named man, Frank Morrissey, previous to his enlistment, and that he was entirely sober when enlisted; that, to the best of my judgment and belief, he is of lawful age, and that I have accepted and enlisted him into the service of the United States under this contract of enlistment as duly qualified to perform the duties of an able-bodied soldier, and in doing so have strictly observed the regulations which govern the recruiting service. This soldier has grey eyes, brown hair, fair complexion, is 5 feet 9½ inches high.

(Signed) WM. BAIRD, [SEAL.]
1st Lieut. 6th Cavalry, Recruiting Officer.

NOTE.—Scars and marks found upon the person of a recruit will be here noted: Vaccine mark on left arm.

[Endorsed:] No. —. Frank Morrissey enlisted at Washington, D. C., on the 23d day of August, 1883, by 1st Lieut. Wm. Baird, 6th Regiment of Cavalry. 1st entistment; last served in —— (—) regiment of ——. Discharged —— —, 18—. Directions, —.

Declaration of Recruit.

I, Frank Morrissey, desiring to enlist in the Army of the United States for the term of five years, do declare that I have neither wife nor child; that I am of the legal age to enlist and believe myself to be physically qualified to perform the duties of an able-bodied soldier, and do further declare that I have never been discharged from the United States service (army or navy) or any other service on account of disability or by sentence of either civil or military court or in any case except with good character and for the reasons given by me to the recruiting officer prior to this enlistment.

Given at Washington, D. C., this 23d day of August, 1883.

(Signed) FRANK MORRISSEY.

Witness:
STEPHEN H. CURRAN,
P'v't G. S., U. S. A.

Consent in Case of Minor.

I, —— ——, do certify that I am the — of —— ——; that the said —— —— is — years of age; and I do hereby freely give my consent to his enlisting as a soldier in the Army of the United States for the period of five years.

Given at —— the — day of ——, ——.

—— ——.

Witness:
—— ——.

11 And afterwards, to wit, on the 17th day of April, A. D. 1889, there was filed to said return an answer in words and figures following, to wit:

Answer to Return to Writ of Habeas Corpus.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri.

In the Circuit Court of the United States in and for said Division of said District, at the March Term, A. D. 1889.

In the Matter of the Petition of FRANK MORRISSEY for a Writ of *Habeas Corpus.*

And now comes Frank Morrissey, petitioner in the above matter, by his attorneys, and, answering to the return of Major David Perry, respondent, denies that the said Frank Morrissey enlisted in the Army of the United States according to the laws of the U. S. governing the recruiting service in manner and form as in said return alleged; and your petitioner further respectfully shows to this honorable court that at the time your petitioner signed the said enlistment paper and went through such other forms of enlistment as are in said return alleged he, the said Frank Morrissey, was only seventeen years of age, as more fully appears from the certificate of birth, which is herewith filed and submitted to the inspection of this honorable court; and your petitioner further shows that at said time his mother, Bridget Morrissey, was his only surviving parent and guardian and entitled to his custody and control, but that said Bridget Morrissey did not then nor subsequently give her consent, either oral or written, to the enlistment of your petitioner, as is more fully shown by the affidavit of Bridget Morrissey, which
12 is herewith filed and submitted to the inspection of this honorable court.

And your petitioner, further answering, respectfully shows that prior to the time of his alleged departure from Jefferson Barracks he had not been assigned to a regular regiment nor to regular military duty, which assignment was a condition precedent to his becoming a soldier under the "Regulations and Rules" of the Army of the United States.

And, further answering, your petitioner respectfully shows that the said alleged departure from Jefferson Barracks occurred more than two years before the issuing of the order for his trial by court martial, and that during said time he has not been out of the United States; that by the laws of the United States, R. S., sec. 1342, art. 103, p. 240, said period of limitation having elapsed, your petitioner is not liable to be tried by a general court martial.

Wherefore your petitioner respectfully prays this honorable court that the writ of *habeas corpus* may be declared absolute; that he may be ordered finally discharged from the custody of the respondent

herein, and for such other and further relief as to this honorable court may seem proper, to the end that he may obtain his liberty.

FRANK MORRISSEY,
By DANIEL N. KIRBY,
His Attorney.

EXHIBIT TO ANSWER.

STATE OF MASSACHUSETTS, }
County of Middlesex, Town of Billerica. }

Francis Morrisey, son of Martin Morrisey & Bridget, was born at Billerica August thirteen, eighteen hundred and sixty-six.

I certify that the above is a true copy of the record of his
13 birth, with the exception of the date, which is expressed on the record in fair, legible figures as follows: "August 13th, 1866."

DUDLEY FOSTER.

I, Dudley Foster, above named, depose and say that I hold the office of town clerk in the town, county, and State aforesaid, and that the above is a true copy from the records of said town, with the exception above named, as certified by me.

DUDLEY FOSTER,
Town Clerk of Billerica.

Subscribed and duly sworn to before me this twenty-second day of March, A. D. 1889. I have no interest in this case.

ALBERT D. STANTON,
Justice of the Peace.

EXHIBIT TO ANSWER.

I, Bridget Morrissey, of Billerica, in the county of Middlesex and Commonwealth of Massachusetts, am the mother of Francis Morrissey, commonly called Frank Morrissey, of said Billerica.

Said Francis Morrissey was born August 13, 1866, and was a minor at the time of his enlistment, August 23, 1883.

At the time of said enlistment I was and still am a widow and did not give my consent for the enlistment of my said son, in writing, orally, or in any way, to any officer of the army, to my said son, or to any one, and in fact I was in total ingorance of the enlistment.

her
BRIDGET x MORRISSEY.
mark.

Witnesses:
DUDLEY FOSTER.
ELIZABETH MORRISSEY.

UNITED STATES OF AMERICA, }
District of Massachusetts, Middlesex, } *ss:*

14 BILLERICA, *March* 25, 1889.

Then personally appeared Bridget Morrissey and made

oath that the statements by her above subscribed are true, before me—

DUDLEY FOSTER,
Justice of the Peace.

And afterwards, to wit, on the seventeenth day of April, A. D. 1889, the following, among other, proceedings were had and appear of record in said cause, to wit:

Order Remanding Petitioner.

In Re FRANK MORRISSEY, Petitioner. 3025. *Habeas Corpus.*

Now, at this day, this cause coming on to be heard upon
15 the return to the writ of *habeas corpus* and the denial thereof and the testimony offered by the respective parties, and the same having been duly considered by the court, it is adjudged and determined that the petitioner is not unlawfully restrained of his liberty, and it is thereupon order- that the be remanded into the custody of Major David Perry, commanding officer of Jefferson Barracks, Missouri, respondent herein.

It is further ordered that the said respondent have and recover of the petitioner his costs, to be taxed, and that a fee bill or execution issue therefor.

And afterwards, to wit, on the tenth day of September, A. D. 1889, the following, among other, proceedings were had and appear of record in said cause, to wit:

Bill of Exceptions Allowed. Writ of Error Allowed. Citation Signed. Bond Approved.

In Re FRANK MORRISSEY, Petitioner,
vs.
Major DAVID PERRY, Respondent. } 3025. *Habeas Corpus.*

Now comes the petitioner, by attorney, and presents to the court his bill of exceptions, which is allowed, signed, and ordered to be filed and made part of the record herein. Said petitioner also presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation, citing and admonishing the said respondent to be and appear at a Supreme Court of the United States, at Washington, D. C., on the first day of the next term thereof, on the second Monday of October next, which said writ of error is allowed and said citation signed by the judge; and thereupon said petitioner presents his bond in the penal sum of one hundred and fifty dollars, which is by the court approved and ordered to be filed as part of the record herein.

16 Said bill of exceptions is in words and figures following, to wit:

Bill of Exceptions.

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

In the Matter of FRANK MORRISSEY, Petitioner for a Writ of *Habeas Corpus*,
vs.
Major DAVID PERRY, Respondent.

Be it remembered that at the March term, A. D. 1889, the application of the above-named petitioner coming on to be heard in the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, before his honor Amos M. Thayer, the following proceedings were had, to wit:

The case was submitted to the court on the facts stated in the return of Maj. David Perry and upon the admission made in open court that at the date of petitioner's enlistment he was in fact only seventeen (17) years of age and had no father living, his mother being at the time his natural guardian, and that she did not consent to the enlistment.

Subsequently, to wit, on the 17th day of April, 1889, the honorable court delivered and handed down its written opinion refusing to grant the petition of said Frank Morrissey and refusing to order him discharged from the custody and control of respondent, but ordering him to be remanded to the custody of said respondent.

Whereupon the petitioner, by his attorney, then and there excepted at the time to the conclusions of law reached by the
17 court and declared in its decision and judgment upon the facts stated in the opinion of the court and uncontroverted on the record.

Having so excepted, and in compliance with directions for review prescribed by the honorable trial judge, the petitioner, by his attorney, now respectfully asks that this *its* bill of exceptions may be allowed, signed, and made part of the record, which is done.

[SEAL.] AMOS M. THAYER,
U. S. Dist. Judge, East. Dist. Mo.

Said appeal bond is in words and figures following, to wit:

Know all men by these presents that we, Frank Morrissey, as principal, and Daniel N. Kirby and Harry J. Cantwell, as sureties, are held and firmly bound unto Major David Perry in the full and just sum of one hundred and fifty dollars, to be paid to the said Major David Perry, his successor or successors; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixth day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at the March term, A. D. 1889, of the circuit court of the United States for the eastern division of the eastern judicial

district of Missouri, in a suit depending in said court between Frank Morrissey, petitioner, and Major David Perry, respondent, judgment was rendered against the said Frank Morrissey, petitioner, and the said Frank Morrissey, petitioner, having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit,
18 and a citation directed to the said Major David Perry, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Frank Morrissey shall prosecute said writ of error to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

FRANK MORRISSEY,
Per DANIEL N. KIRBY, [SEAL.]
His Attorney.
DANIEL N. KIRBY. [SEAL.]
HARRY J. CANTWELL. [SEAL.]

Approved by—
AMOS M. THAYER,
U. S. Dist. Judge.

19 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

In Re FRANK MORRISSEY, Petitioner.

Charles Nagel and Daniel N. Kirby, attorneys for petitioner.
Thomas P. Bashaw, U. S. attorney, for respondent.

Opinion, April 17th, 1882.

THAYER, *D. J.:*

This is an application by petitioner, who has gone through the form of enlistment into the military service, to be discharged from arrest. He is held now under a charge of desertion duly preferred, and is awaiting trial upon such charge. He asks to be released from arrest upon the ground that he was a minor between the age of 16 and 21 years at the date of his enlistment, and that he was enlisted without the written consent of his mother, who was then living, his father being dead.

He does not deny that he voluntarily went through the form of enlistment at Washington, D. C.; that he made oath before the recruiting officer that he was 21 years and 5 months old; that he was furnished transportation to Jefferson Barracks, Missouri, where he was ordered to report for drill as a recruit; that he was provided with a uniform and other equipments, and subsequently left the post without the knowledge or assent of his commanding officer, and subsequently was arrested as a deserter.

It is unnecessary to do more than state the conclusions I have formed with respect to the case.

Conceding that the petitioner was only 17 years old at the
20 date of his enlistment and had a mother living who did not consent to his enlistment (as the proof shows), the contract of enlistment was merely voidable.

Even if the petitioner would be entitled to have the contract abrogated on his own application to a Federal court, without his parent joining in such application (as to which point no opinion need be expressed), it does not follow that he could take the law into his own hands and desert.

As was said by a majority of the court in Wilbur *vs.* Grace, 12 Johnson's Rep., 12, a soldier "may be entitled to his discharge, but it does not follow that he is to be his own judge and discharge himself by desertion. Any person detained by military authority or military force may obtain his discharge, if he is entitled to it, by application to the proper civil authorities; but a soldier in actual service cannot be allowed to desert at pleasure."

The doctrine contended for in this case, that a person above the age of 16 years who has voluntarily enlisted in the military service and subsequently deserted on the assumption that his enlistment was illegal may obtain his discharge by *habeas corpus* after being formally arrested on a charge of desertion and while being held for trial on such charge, is too dangerous to be tolerated.

It tends to subvert military discipline. A soldier who claims that his contract of enlistment is illegal for any reason should seek to have it cancelled by legal methods.

In the present case the petitioner became a soldier *de facto* by his own showing. The military court has jurisdiction to try a charge of desertion lodged against a person above the age of 16 who has voluntarily gone through the form of enlistment and submitted himself to military discipline. That court is also competent
21 to determine how far the fact that petitioner was under 21 at the date of enlistment and had a mother living who did not consent thereto in writing is a defence to the charge.

As the military authorities have jurisdiction of the petitioner and of the offence with which he is charged until he has been discharged from enlistment by some appropriate proceeding or by order of the Secretary of War, he must be remanded.

It is so ordered.

22 UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings in case No. 3025, *In re* Frank Morrissey, petitioner, against Major David Perry, respondent, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the

seal of said court, at office, in the city of St. Louis, in the eastern division of said district, this seventh day of October, in the year of our Lord eighteen hundred and eighty-nine.

{ Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. }

A. P. SELBY,
Clerk of said Court,
By —— ——, *Deputy.*

23 [Endorsed:] No. 3025. United States circuit court, eastern division of the eastern judicial district of Missouri. *In re* Frank Morrissey, petitioner, against Major David Perry, respondent. Duly certified transcript of the record in the above-entitled cause.

[Endorsed:] No. 3025. United States circuit court, eastern division of the eastern judicial district of Missouri. *In re* Frank Morrissey, petitioner, against Major David Perry, respondent. Duly certified transcript of the record in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 931. Frank Morrissey, plaintiff in error, *vs.* Major David Perry. Filed October 12, 1889.

In the Supreme Court of the United States

OCTOBER TERM, 1889.

UNITED STATES, APPELLANT, *vs.* TRINIDAD COAL AND COKING Company.	No. 1135.

UPON A MOTION BY THE UNITED STATES TO ADVANCE.

BRIEF IN SUPPORT OF THE MOTION

WM. A. MACEY,
Assistant Attorney General.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

UNITED STATES, APPELLANT,
vs.
TRINIDAD COAL AND COKING Company.
No. 1135.

UPON A MOTION BY THE UNITED STATES TO ADVANCE.

BRIEF IN SUPPORT OF THE MOTION.

This case arises upon sections 2347 and 2350, Revised Statutes of the United States.

Section 2347 is as follows:

> SEC. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

Section 2350 is as follows:

> SEC. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and *no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof;* and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

The intermediate sections 2348 and 2349, which are referred to along with section 2347 in section 2350, are merely regulative of pre-emption rights acquired under sections 2347 and 2359, and need not be particularly referred to.

The Trinidad Coal and Coking Company not being able to avail itself of the privileges extended by these sections, owing to the fact that some of its members had exercised their full right to purchase, attempted to accomplish the same end indirectly by contracting with several individuals, who were entitled to enter coal lands under the law, to make entries of such lands, nominally for themselves, *at the expense of the company and convey the rights thus acquired to the company.*

The bill was filed by the United States in the United States circuit court for the district of Colorado to cancel the patents acquired by virtue of these entries.

The bill was dismissed upon demurrer.

In his opinion the learned judge of the circuit court (Brewer, J.) said:

> A purchase of coal lands from the United States, made by one authorized by law to buy such lands, for the benefit and at the expense of a corporation, under a previous agreement that the land should be conveyed to the corporation when the patent should issue, is legal, though the corporation could not by law have purchased the land, some of its members having already exercised their full right to buy such lands, as such previous contract is not prohibited under the statute relative to coal lands.

In administering this law the General Land Office has proceeded on the view that what was done by the company in this case was evasive and a fraud on the law, and so voidable at the instance of the United States.

In his letter to the Attorney-General, asking that an application be made to the court to advance this case, the Secretary of the Interior uses the following language:

> Inasmuch as a number of cases are now pending in the Department involving this question, action upon which has been suspended until the ruling of the Supreme Court in this case, and as the rights of parties may be seriously impaired by delaying decision in their cases until this question has been

disposed of by the Supreme Court, I respectfully recommend that application be made for the advancement of said case, an early disposition being of the utmost importance to the expedition of the business of this Department.

It is respectfully asked that the court will order this case to be set down for argument at the present term.

WM. A. MAURY,
Assistant Attorney General.

Supreme Court of the United States.

No. 931. October Term, 1890.

FRANK MORRISSEY, PLAINTIFF IN ERROR,

v.

DAVID PERRY, DEFENDANT IN ERROR.

Availing myself of the courtesy of the Solicitor-General I desire, as counsel for the plaintiff in error, to submit to the Court, in addition to what appears on the record [p. 12] and on my brief [p. 2], a brief personal statement explaining how the transcript of record in this case happens to be in the form of a "writ of error" instead of an "appeal."

After the decision of the Circuit Court, my associate in St. Louis, Mr. Kirby, both of his own motion and under instructions from me, urged upon the attention of the Circuit Court the use of the word "appeal" in the statutes and the precedent already established in the Massachusetts Circuit in United States *v.* Grimley, No. 761. The Court, however, after full consideration, ruled that as the facts were agreed, and there was no evidence upon any disputed issue of fact going up at the request of either party to be examined and passed upon by the Supreme Court, none of the essential characteristics of an appeal were present, and that the correct way to raise the mere questions of law arising on the record was by a "writ of error." Under these circumstances, as the question became one of words only

and not of substance, — precisely the same record being in either case laid before this Court, and precisely the same questions, and none other, being raised by a "writ of error" as by an "appeal" — and as the Circuit Court declined to allow an "appeal," *eo nomine*, but prescribed [under Revised Statutes, Section 765] a bill of exceptions to the Court's conclusions of law "upon the facts stated in the opinion and uncontroverted on the record" [pp. 11, 12] and a writ of error for sending up the record, counsel for the petitioner had no choice but to acquiesce; and as a review of the case by the Supreme Court on the merits of the subject-matter was to him a matter of absolute right, — not of discretion in the court below, — we felt that that right could not, under the circumstances, be either jeopardized or impaired, or the petitioner be in any way prejudiced or delayed, by a matter of mere form and phraseology wholly beyond his and our control.

Respectfully submitted,

HENRY W. PUTNAM.

Boston, October 16, 1890.

Office Supreme Court U. S.

Supreme Court of the United States.

FRANK MORRISSEY,

Plaintiff in Error,

v.

DAVID PERRY,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

HENRY W. PUTNAM,
DANIEL NOYES KIRBY,
Of Counsel for Plaintiff in Error.

BOSTON:
PRESS OF ROCKWELL AND CHURCHILL.
1890.

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Supreme Court of the United States.

No. 931. October Term, 1890.

FRANK MORRISSEY, Plaintiff in Error,

v.

DAVID PERRY, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This is a petition for writ of habeas corpus, brought by Frank Morrissey in the Circuit Court of the United States for the Eastern division of the eastern district of Missouri, for his release from the custody of the United States military authorities who seek to hold him as a deserter from the army. The decree of the Circuit Court was in favor of the government, and the petitioner appeals to this court. References are to pages of the printed record.

The material facts disclosed by the record are as follows: —

Statement of the Case.

The petitioner was born Aug. 13, 1866 (page 10). On Aug. 23, 1883, the petitioner, by occupation a sailor (page 7), being then seventeen years and ten days old, went through the form of enlistment for the term of five years into the army of the United States, at Washington. This was done without the consent, or even knowledge, of his mother, who was his only surviving parent (page 10), and he made oath before the recruiting officer that he was twenty-one years and five months old. Uniform and equipments were

issued to him, and he was transported to the recruiting and forwarding station of Jefferson Barracks, Missouri, where he was ordered to report for duty and drill as a recruit. At the barracks he was put upon drill duty as a recruit, and on Sept. 13, 1883, — only twenty days after his enlistment, and ten days before his first monthly instalment of pay would become due (Rev. St., Sec. 1280), — he left the barracks without the knowledge or consent of the authorities (page 6). It is not alleged that he took with him any articles, either of equipment, clothing, food, or otherwise, the property of the United States. Five years and five months afterwards, in February 1889, and after the term for which he had enlisted had expired, being then twenty-two years and six months old, he voluntarily entered a recruiting office at Boston, Mass., made himself known, and demanded his discharge on the ground that he was a minor at the time of his alleged enlistment (p. 6). He was at once arrested as a deserter, and taken back to Jefferson Barracks for trial by court-martial as a deserter (pages 6, 7). While waiting such trial, on April 3, 1889, he brought this petition for habeas corpus. The writ was issued on April 9, returnable April 12, and the judgment is dated April 17, 1889.

The writ of error (as distinguished from a simple appeal, which seems to be indicated by the Rev. Stat., Sect. 763–4, as amended by Stat. 1885, Chap. 343) was taken "in compliance with directions for review prescribed by the honorable trial judge" (pages 1, 12,) the Circuit Court having prescribed such proceeding under the discretion vested in it by U. S. Rev. Stat., Sect. 765. While this Court has, by Rule thirty-four, prescribed regulations under Sect. 765 as to the custody of the prisoner, the regulating of the sending up of the transcript of record appears to be still vested in the court below.

The record shows that the judgment below was not a mere order of a judge in chambers (as in Carper *v.* Fitzgerald, 121 U.S., 87, and in *re* Palliser, 40 Fed. Rep. 575), but a decision of the court after hearing and argument in open court, time taken for advisement, and a written opinion filed.

Specifications of Error.

1. Morrissey had not, either at the time of his alleged desertion or subsequently, become legally a soldier, and cannot, therefore, be held by the military authorities either for service as a soldier, or for trial by court-martial as a deserter.

2. The expiration of more than two years between his alleged desertion and his arrest is a bar to all proceedings against him and entitles him to his discharge.

Argument and Authorities.*

I.

Morrissey had not become legally a soldier.

The enlistment of Minors.

1. The United States Revised Statutes, Section 1117, provide explicitly that "No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: *Provided*, That such minor has such parents or guardians entitled to his custody and control."

The consent of parents, — of the mother if the father is not living, — as well as of the infant and of the government, is a condition precedent to the government's right to the custody of the infant's person. Morrissey's alleged enlistment, being in direct contravention of this provision, and not fulfilling the condition precedent, was illegal and not binding upon him, and was consequently void at his election. We give the leading authorities in chronological order: —

Ex parte Mason, 1 Murphy (N. C.), 336, (1809).

Shorner's Case, 2 Carolina Law Repository, 55, 59, U. S. D. C. Penn. (1812).

U. S. *v.* Anderson, 1 Cooke (Tenn.), 143, U. S. Circuit Court (1812).

* See also brief in Grimley's case.

Commonwealth *v.* Harrison, 11 Mass., 64, 65 (1814).
Commonwealth *v.* Cushing, 11 Mass., 67, 70–1 (1814).
Commonwealth *v.* Callan, 6 Binney, 255 (1814).
Lewis' Case, 1 Carolina Law Repository, 47, 53–4 (1815).
Carleton's Case, 7 Cowen, 471 (1827).
Commonwealth *v.* Downes, 24 Pick., 227, 229, 230, (1836).
Keeler's Case, Hempst. 306, 310 (1843).
Commonwealth *v.* Fox, 7 Barr (Penn.), 336 (1847).
Kimball's Case, 9 Law Reporter, 500, Mass. S. J. C. (1847).
U. S. *v.* Wright, 5 Philadelphia 296, 298 (1863).
In re McDonald, 1 Lowell, 100, 105 (1866).
In re Andrews, 1 Hask., 87 (1867).
In re McLave, 8 Blatch., 67 (1870).
Commonwealth *v.* Blake, 8 Phil., 523 (1871).
In re McNulty, 2 Lowell, 270, (1873).
U. S. *v.* Hanchette, 18 Fed. Rep., 26, (1883).
In re Baker, 23 Fed. Rep., 30 (1885).
In re Chapman, 37 Fed. Rep., 327 (1889).

"But in this case, when he (the father) is dead, a 'parent' (the mother) is still left to satisfy the words of the law, 'if any he have.' In the light in which I view the law and case, I cannot but consider the enlistment as invalid." (Peters, J., in Shorner's Case, *ubi supra.*)

"That assent, if effectual within the true intent of this act of Congress, is the only thing which renders the enlistment valid. The agreement without such assent is wholly void. I am of the opinion that the enlistment in this case, being without the consent of the father, is void." (Jackson, J., in Lewis' Case, *ubi supra.*)

"By the act of Congress the enlistment is void." (Savage, C. J., in Carleton's Case, *ubi supra.*)

"A penalty inflicted by statute for an act implies a prohibition of the act, so as to make a contract relating to it void." (Coulter, J.,

in Commonwealth *v.* Fox, 7 Barr, 336, 338.) (See R. S., sect. 1342. Art. 3.)

"It therefore appears in plain Saxon that the contract of enlistment with a minor being prohibited by the statute is not merely voidable, but absolutely void." (McCandless, J., in U. S. *v.* Wright, *ubi supra.*) [The headnote of the case indicates that the minor was below the minimum age; but this is a mistake, for the opinion states that he was nineteen years old.]

"It is a well-settled doctrine of every system of jurisprudence that whatever is done in contravention of prohibitory law is null and void. I think that in accordance with this principle the enlistment of a minor, without a written consent of his parent or guardian, if he has one entitled to his services and control, is invalid, and of no legal effect, and, on principle and authority, that the invalidity may be claimed by the minor himself before or after attaining majority, or by any person entitled to his control or services.

Pardee, J., in Chapman's Case, *ubi supra.*

We especially refer to the last-named case as on all-fours with our own, and meeting every defence raised by the government.

R. S., Sect. 1117, is the second of three consecutive mandatory sections prescribing as prerequisites of entrance into the military service that the recruit shall be able-bodied and effective; shall be not less than sixteen nor more than thirty-five years old; shall have the written consent of parent or guardian if a minor; and shall not be insane, intoxicated, a deserter, or convicted of felony. All of these qualifications stand in the Statute on a par, and are equally essential and inviolable, whether from the point of view of the government or of the recruit. This is clearly shown not only by the similar phraseology of the three sections themselves, but also by Sect. 1342, Art. 3, which in terms declares enlistments made in violation of any of their provisions to be equally unlawful, and imposes severe penalties upon officers who knowingly make such enlistments. To hold any of them to be merely "directory" would be dangerous to personal liberty

and in violation of the sound canons of statutory interpretation. (see Sedgwick on Statutes, 335 *et seq.*,) and the government that made the statutes certainly should not be allowed to invoke any such lax construction against the citizen. Neither the military nor the executive officers of the government can waive or dispense with, nullify or evade, a condition precedent like the one we are considering, prescribed by a mandatory provision of law. The Congress alone can do that. "The enlistment of a recruit under either section is illegal."

Brown, J., in Cosenow's Case, 37 Fed. Rep., 668.

At Common Law.

2. At common law an infant's contract cannot be enforced against him, and it is therefore void unless he ratifies it after he becomes of age.

It is ordinarily called "voidable;" but the name is a misleading one as it implies that the contract is valid unless expressly repudiated, whereas it is, on the contrary, void unless ratified. It could more accurately be called "ratifiable." "The promise of an infant, though not binding, is not a nullity; it can be made binding by a ratification after the infant comes of age." (Langdell's "Summary of the Law of Contracts," § 82, p. 104.) An infant's contract is, in the absence of ratification after majority, — *à fortiori* if it is expressly repudiated after majority, — as completely void as any contract can be. If it is an executory contract he cannot be sued for its breach or compelled specifically to perform it; if it is an executed one, — involving a change of status, like enlistment, — he is entitled to be discharged from the status for the unexpired portion of the term if he wishes to be. (See cases cited, *supra*).

Upon the facts of our case it is immaterial whether we call the contract "void" or "voidable." The distinction between the two terms is, so far as we are concerned, a distinction without a difference: for even if we assume that it was only voidable when made, it has been amply avoided since, and when once avoided it becomes as void *ab initio* as if it had been originally void in the strict sense, *i.e.*,

incapable of ratification. Within twenty days after enlisting, Morrissey repudiated the contract and continued such repudiation up to his majority, and for almost two years after his majority, by staying away the entire term of his enlistment and then presenting himself only to demand his discharge on the express ground of infancy (p. 6), and applying for habeas corpus as soon as he was arrested. The fact that in the meantime there existed a legal possibility that the contract might be ratified after majority is immaterial, if it never was in fact so ratified.

An infant's contract for military service, like any other of his contacts, can, at common, law be effectively ratified by him only after his majority.

State *v.* Dimick, 12 N. H., 194, 199.
Kimball's Case, 9 Law Reporter, 500, 502.

Except so far as it may have been already executed, it remains voidable, and therefore, — if he repudates or does not ratify it, — void as to him. He may, accordingly, at any time before his majority, or within a reasonable time after his majority, repudiate it, and obtain a release from it on habeas corpus.

The record discloses no ratification of the contract by Morrissey, after he was twenty-one, but, on the contrary, an unequivocal repudiation of it from Sept. 13, 1883, continuously, both before and after his majority, up to the date of this petition. In State *v.* Dimick, 12 N.H., 194, the recruit remained in the service, receiving pay, a year after his majority; in Spencer's Case, 40 Fed. Rep., 149, six months; in Dohrendorf's Case, 40 Fed. Rep., 148, two years and a half; in Kaufman's Case, 41 Fed. Rep., 876, nearly two years.

No neglect of the parent to petition for his discharge can prejudice a minor or amount to ratification of the enlistment.

State *v.* Dimick, 12 N. H., 194.
Telegraph Co. *v.* Davenport, 97 U. S., 369, 373.

EFFECT OF THE STATUTES ON THE COMMON LAW.

3. U. S. Rev. Stat., Sect. 1117, — even if it does not go so far beyond the common law in its protection of infants as to make the consent of the parents an absolute condition precedent and to make enlistment without that consent absolutely void and incapable of ratification, which we claim (*supra*, *pp.*) to be the true view, — is at least declaratory of the common law, with the added protection that the consent of the parents must be *in writing*. It takes away nothing from the common law protection or disability of the infant, — with the possible exception that under the statute the parents' written consent, when obtained, may make the contract absolutely and irrevocably binding upon him even after reaching twenty-one, while even it might not be so at common law.

The original of Sects. 1116 and 1117 was as follows, to wit (St. 1802, Ch. 9, Sect. 11, 2 St. L., 134–5) : —

"The commissioned officers who shall be employed in the recruiting service, to keep up by voluntary enlistments, the corps as aforesaid, shall be entitled to receive for every effective able-bodied citizen of the United States, who shall be duly enlisted by him for the term of five years and mustered, of at least five feet six inches high, and between the ages of eighteen and thirty-five years, the sum of two dollars: Provided, nevertheless, that this regulation, so far as respects the height and age of the recruit, shall not extend to musicians or to those soldiers who may re-enlist into the service; and provided also, that *no person under the age of twenty-one years shall be enlisted by any officer, or be held in the service of the United States, without the consent of his parent, guardian, or master, first had and obtained, if any he have;* and if any officer shall enlist any person, contrary to the true intent and meaning of this, for every such offence he shall forfeit and pay the amount of the bounty and clothing which the person so recruited may have received from the public, to be deducted out of the pay and emoluments of such officer."

This last proviso is purely declaratory of the common law, and is evidently added to prevent an implied repeal of the common law

disability as to infants over eighteen by the main body of Sect. 11, which, by forbidding enlistment under eighteen, might, if taken by itself without such proviso added, seem by implication to absolutely legalize all voluntary enlistments by minors over eighteen. "When the law provided for enlistment by contract, it implied that the contract should be made with persons capable (*i.e.*, already, at common law) of making it. . . . Supposing, therefore, that this is not militia service and depends upon the stipulations of the party himself, a minor cannot be held by his enlistment made without the consent of his parents, master, or guardian." (Shaw, C. J., in Kimball's Case, 9 Law Reporter, 500, 502, 503.) The additional safeguard for the minor of *written* consent of parents was added by Stat. 1812, Chap. 14, Sect. 11 (2 St. L., 672), and Stat. 1813, Chap. 12, Sect. 5 (2 St. L., 792).

The statutes, therefore, evidently leave the matter thus: —

(1.) A minor under sixteen years (to which age the minimum was reduced by Stat. 1864, Chap. 237, Sect. 5, 13 St. L., 380) cannot enlist at all; (2) a minor over sixteen, with no parent or guardian, cannot enlist at all so as to bind himself (Commonwealth. *v.* Cushing, 11 Mass., 67); and (3) a minor over sixteen, having parents or guardian, cannot enlist so as to bind himself without their written consent, and with that consent he is perhaps absolutely and irrevocably bound even after majority.

Every minor retains for himself undiminished every common-law right of disaffirmance or avoidance, with something (to wit: *written* consent) added for his protection. A statute will not be construed as in derogation of the common law unless the express language absolutely requires it, much less where the language is consistent with and confirmatory of the common law.

Potter's Dwarris on Statutes, 185–6.
Sedgwick on Statutes, 267 *et seq.*

"The Legislature ought not lightly be presumed in any case thus to violate a fundamental principle of the common law." (Commonwealth *v.* Cushing, 11 Mass., 67, 70.)

That Congress intended by Sect. 1117 to increase, not diminish, the infant's disability and consequent protection, and to do so for his own sake, not for that of his parents or guardian, is clearly shown by the debate attending the passage of the Act of May 15, 1872 [17 St. Large, 117–118], which is the original of Sect. 1117, and identical with it. (See Congressional Globe, 1871–2, p. 1645–6, H. R., No. 838. (See also same volume, pp. 302, 1078, 2342, 2401, 3294.)

The reasoning of Judge Wallace, in Davidson's Case, 21 Fed. Rep., 618 622–3, that Sect. 1116, by prohibiting enlistments under sixteen [formerly eighteen], impliedly makes the enlistment of the minor over sixteen absolutely and finally valid as to him and voidable by the parents alone, and by them only during the infant's minority, — overlooks the relation of the statutes to the common law, and therefore misstates their effect upon the common law. He assumes that the common law disability has been wholly removed between the ages of sixteen [originally eighteen] and twenty-one by Sect. 1116, [St. 1802, 1812–13–14–15], and then treats Sect. 1117 as a new statute subsequently passed upon a *tabula rasa*, and creating a new right for the parents only. The history of Sects. 1116 and 1117, as we have above traced it, — which history Judge Wallace puts aside without examination [21 Fed., Rep., 622] as throwing no light upon the subject, — shows clearly and conclusively that, so far from removing the common-law disabilities of infancy at all, Congress solemnly declared those disabilities and enacted them into a confirmatory act in the very same statute and even section [St. 1802, Ch. 7, Sect. 11] in which it prohibited enlistment below eighteen and above thirty-five, by requiring the consent of parents to enlistments of minors above eighteen and subsequently [St. 1812, Ch. 14, Sect. 11] requiring the consent to be in writing. This was done in a proviso, as we have seen, so as expressly to prevent the main body of the section from having the effect, which Judge Wallace ascribes to its successor, Sect. 1116, of removing the common-law disabilities of minors above the minimum age, and of putting them on a par with adults.

This view of the statute was early adopted by the full bench of

the Supreme Judicial Court of Massachusetts, in 1814, and is thus announced in Commonwealth *v.* Cushing, 11 Mass., 70: —

"Infants are, by the common law, incapable of making any contract binding on themselves, except in a very few instances. This incapacity is a security intended for their benefit and protection. But the statutes of the United States on the subject of enlistments, deprive them of this security and protection, *unless the proviso may be considered as preventing its operation upon them. And we think that such must be its intention.* . . Perhaps the contract of enlistment by the minor is not *ipso facto* void; but we hold it voidable at *his* instance and request."

Commonwealth *v.* Cushing, *ubi supra.*

As a necessary link in his argument Judge Wallace also assumes as obvious "that Section 1117 was not intended for the benefit of the minor or for his protection, because it has no application unless he had a parent or guardian who is entitled to his custody and control." (21 Fed. Rep., 623). But the very reverse has, as we have seen, been authoritatively, and with evident soundness, held by a court of last resort to be the law, viz., that it *does* apply to a minor with no parent or guardian living, and that such a minor is not bound by his enlistment, *i.e.*, such a minor still stands as at common law, with the additional safeguard of *written* consent.

Commonwealth *v.* Cushing, *ubi supra.*

"The true construction must be that persons under the age of twenty-one years are not to be enlisted or to be held in service unless with consent of their parents, guardians, or masters, first had and obtained; and *if they have no parent, guardians, and masters they are not to be enlisted or held in the service at all.*

Commonwealth *v.* Cushing, 11 Mass., 73.

"The *protection to the minor* was *extended* in like manner, and still

more effectively, by requiring the consent of his parent, guardian, or master."

Baldwin, J., in U. S. *v.* Cottingham, 1 Rob. Va., 615, 632, bottom.

The reasoning of Judge Wallace involves also an incorrect use of the term "voidable" as applied to an infant's contract in law. The correct and well understood use of it in law is "avoidable" by the infant during his minority or within a reasonable time after arriving at his majority;" but Judge Wallace makes it mean "avoidable by the parents during the infant's minority, and not by the infant himself at all either before or after his majority." Such a use is entirely unknown to the law, and cannot be correct except upon the hypothesis that the common law of infancy has been wholly repealed as to enlistment, and that the whole power of custody, even as against strangers, is given to the parent alone, and that in the event of the minors having no parent, or of the parent's refusal or neglect to apply for *habeas corpus*, the infant's right of personal liberty is destroyed. Such a result is preposterous, and we believe we have shown it to be unsound in law, on the authorities.

If it be urged, — or if Judge Wallace be represented as holding, — that while the common-law right of the infant to his personal liberty may be preserved, still the statute gives *the parent* alone the remedy; our answer is, that the statute is not dealing at all with remedies, but only with rights; and if the infant's common-law right of personal liberty remains, his common-law remedy by *habeas corpus* remains also. (See Rev. St., Sect. 754); the right would be a barren one without a remedy in his own hands, though the parent also retains his common-law right to petition for *habeas corpus*, even though the infant himself wishes to remain in the military service. (See U. S. *v.* Anderson, 1 Cooke, Tenn., 143, 145–6.) It is, moreover, literally a *reductio ad absurdum* of this contenion that, if it were law, when the infant reached his majority so that his parent could not petition, he would become absolutely remediless and could not effectively repudiate the contract. As the cases which

follow the decision on Davidson's Case proceed upon the same erroneous reasoning, it is unnecessary to comment upon them specifically.

The infant's common-law right to avoid his contract himself is, we submit, not taken away. Both that right and the parents' right of custody remain intact, and are fortified by the requirement of written evidence of consent. The infant can himself assert his personal liberty against anybody but his parent.

The true view of the whole subject is, that the common-law disability of all minors is intact with the added disabilities and safeguards that no minor under sixteen can enlist at all, and that for all minors over sixteen the consent of parents — where there are any — is absolutely necessary, and must be in writing; and where there are no parents, there is no binding enlistment.

The decision of Judge Blatchford in Riley's Case (1 Benedict, 408, 413, *et seq.*) proceeds on the erroneous assumption that the Act of 1814 (St. 1814, Ch. 10, 3 St. L., 146, Sect. 3) abolishing the disability of minority and the requirement of parents' consent was still in force; and the Supreme Court of Wisconsin inadvertently fell into the same error (*Re* Gregg, 15 Wis., 531; *Re* Higgins, 16 Wis., 231), and Bacon, J., in Beswick's Case, 25 How. Pr. 147; but it is now well settled that the Act of 1814 was repealed four months afterwards by St. 1815, Ch. 79, (3 St. L., 225) which restored the peace establishment and provided in Sect. 7 that the army "be recruited in the same manner *and with the same limitations*" as in the Act of 1802, which requires the consent of parents.

Shaw, C. J., in Kimball's Case, 9 Law Reporter. 500, 502–3.
Gray, J., in Tyler *v.* Pomeroy, 8 All., 490, 492–3.
Clifford, J., in Seavey *v.* Seymour, 3 Cliff., 439, 447–9.
Lowell, J., in McDonald's Case, 1 Lowell, 100, 102–3.
Fox, J., in Andrews' Case, 1 Hask., 87.

The consent of parents has, therefore, always been required by common law, and since 1802 by statute, with the exception of four

months, from December, 1814, to March, 1815; and the *written* consent apparently ever since 1812, excepting the same four months. Therefore, while Congress has the constitutional power to abrogate the common law on this point (U. S. *v.* Bainbridge, 1 Mas., 71), it has not done so, and the minor's right has, in fact, been continuously protected and steadily increasing, — with the short exception in 1814–5. Moreover, that the protection of requiring the parents' written consent was intended primarily and chiefly for the personal protection of the infant, and not to secure to the parent the service of the child, is shown by the fact that though the mother had herself no legal right to those services (Commonwealth *v.* Murray, 4 Binney, 487), yet her consent was early held necessary for the minor son's protection, where the father is not living.)

Commonwealth *v.* Callan, 6 Binney, 155.
Shorner's Case, 2 Car. Law Repos., 55, 59.

The re-enactment of the requirement of *written* consent in a separate statute, in 1872 (St. 1872, Ch. 172, Sect. 1; 17 St. L., 117–118), now R. S., Sect. 1117, was presumably to remove all doubts whether the Act of 1815, in repealing the Act of 1814, restored the Act of 1802 *as it originally stood* (*i.e.*, requiring simply "consent," as at common law), or *as it was amended* by the Acts of 1812 and 1813, requiring the *written* consent. On either hypothesis, consent had always been necessary, except for the four months mentioned, and the only question, in 1872, was, whether it had since the Act of 1815 been required to be in writing. The Act of 1872 (R. S., Sect. 1117) was therefore not passed for the benefit of parents on a *tabula rasa* under which minors had no disabilities and no protection, but the very reverse.

An additional remedy for minors by appeal to the Secretary of War was given by St. 1850, Ch. 78, Sect. 5 (9 St. L. 507), repealed by St. 1862, Ch. 25, Sect. 2 (12 St. L., 339), and re-enacted by St. 1864, Ch. 13, Sect. 20, and Ch. 237, Sect. 5; (13 St. L., 380). This remedy was not exclusive of, or a substitute for, the remedy

by *habeas corpus*, but supplementary and additional thereto, and it no longer exists, not having been enacted in the Revised Statutes.

In re McDonald, 1 Lowell, 100, 105.
In re Andrews, 1 Hask., 87.
Seavey *v.* Seymour, 3 Cliff., 439, 450-1-2-3.
U. S. Rev. St., Sect. 5596.
Winthrop's Military Law, 778.

MORRISSEY HIMSELF THE PROPER PERSON TO PETITION.

4. Morrissey being 22 years old at the date of this petition, he and not his mother is, on any hypothesis, the person to apply to the court. It is, therefore, unnecessary to discuss at more length the proposition which runs through some of the decisions, that Sect. 1117 was enacted for the sole benefit of the parents, and cannot be availed of by the infant. The parent had the right of custody at common law, and enacting that right into a statute, with the added requirement of the written evidence of consent, cannot exclude the common-law right of the infant to his personal liberty as against strangers. The statute was, as we have seen, enacted as an additional guarantee to the personal liberty of the infant as well as to the right of the parent.

Even if Sect. 1117, taken by itself, be regarded as in form a provision that, in the absence of the parents' consent, the custody of the infant remains with the parent instead of with the military authorities, still that custody is a trust for the infant's own benefit and protection. "The custody of minors is given to their parents for their (the minors') maintenance, protection, and education." Story, J., in U. S. *v.* Brainbridge, 1 Mason, 71, 78. (See, also, Shaw, C. J., in Kimball Case, 9 Law Reporter, 500, 502.) He can, therefore, evidently himself obtain restoration from the military to the parental custody for his own benefit, if the parent refuses or neglects to petition for his release. "These enlistments are voidable by the minors themselves, or by their parents, as well as by the government." (Lowell, J., in McNulty's Case, 2 Lowell, 270, 273.)

In any event, when the minor reaches his majority, the parents' right, — whatever its character, — terminates, and the son succeeds to the parents' right to petition for *habeas corpus* in addition to his own right to do so, so that the sole right is vested in him. Indeed, his right by common law to repudiate the contract made by him during infancy necessarily involves the right to apply for *habeas corpus* to release him from a contract which gives the custody of his person to others.

5. If Morrissey was, as we think we have shown, not legally a soldier either then or now, and could not be held for military service, he could not be a deserter, and the court-martial, therefore, has no jurisdiction over his person on a charge of desertion, and the defendant in error has no right to the custody of his person.

See "Grimley" brief *passim*, and authorities there cited.

The jurisdiction of the court-martial in regard to desertion is over "soldiers" who have "received pay" or have been "duly enlisted" (R. S., Sect. 1342, Art. 47.) It is, therefore, only co-extensive — so far as concerns the persons affected by it — with Sections 1116, 1117, and 1118, — with the single addition that it has jurisdiction over the person of a soldier who has "received pay,' whether he has been legally, or "duly," enlisted or not. It is unnecessary to consider whether the language of Art. 64 — defining the general power of courts-martial over "soldiers . . . mustered and in pay" — is broad enough to confer upon courts-martial a general jurisdiction for other offences than desertion over any persons who have not been "duly enlisted," and have not actually "received pay." We submit that it evidently is not; but as Morrissey is charged only with desertion, his case is governed by Art. 47.

Morrissey does not come within the other alternative mentioned in Art. 47, of "having received pay." The return does not allege that he had received any pay, and it will not be presumed that he had. The pay is $13, payable monthly, for a cavalry private in his first term of enlistment (Rev. St., Sect. 1280.) As Morrissey had only been twenty days in the service his first pay was not yet due

him. He had "drawn his rations, arms, equipments, and clothing as such (*i.e.*, as recruit and soldier of the mounted service), and continued in such service and pay," and had been mustered for pay" (see return, pp. 6–7,) but he had not yet" received pay" (see Gray, J., 8 Allen, 491–2.) Neither transportation, rations, arms, equipments, nor clothing, are pay, nor are they charged against or deducted from the private's pay.

It follows, from the foregoing, that on Sept. 13, 1883, Morrissey was not a soldier, and is, therefore, entitled to his discharge from military custody on his own petition, unless he is estopped either, first, by his statement as to his age; or, second, by his remaining twenty days in the service after his enlistment; or, third, by his departure from the barracks without leave.

Minor's Representation as to His Age.

First. The statement at the time of the enlistment, that he was twenty-one years old, does not estop him from obtaining his discharge.

U. S. *v.* Wright, 5 Phil., 296, 297.
In re McDonald, 1 Lowell, 100.
Seavey *v.* Seymour, 3 Cliff., 439, 447.
Commonwealth *v.* Blake, 8 Phil., 523.
In re McLave, 8 Blatch., 67.
In re Tarble, 25 Wis., 390, 412, 413.

"Congress never intended (by Stat. 1862, Chap. 25, 2 St. L., 239) that the oath, however false, should be binding on the courts, or give validity to a contract which an unrepealed statute declared to be illegal." (McCandless, J., 5 Phil., 297.)

Such representations as to his age never bind an infant. To hold that they do " would endanger all the rights of infants."

Story, J., in Tucker *v.* Moreland, 10 Peters, 58, 77.
Conroe *v.* Birdsall, 1 Johns. Cas., 127, 128.
Merriam *v.* Cunningham, 11 Cush., 40.

The provisions of Stat. 1862, Chap. 25, Sect. 2, that the oath shall be conclusive, was only intended for the protection of officers from the penalty of enlisting minors without the consent of parents (Commonwealth *v.* Blake, 8 Phil., 523, 527–8; Seavey *v.* Seymour, *ubi supra*); and not being in the Revised Statutes is repealed by Rev. Stat., Sect. 5596. Winthrop's Military Law, 778. No oath as to the age is now required by law (Rev. Stat., Sect. 1342, Art. 2), and an oath not required by statute has no more effect than any other false representation by a minor as to his age. Moreover, in the present case, the statement as to his age is not in the oath taken by the recruit at all, nor even in the "acknowledgment" preceding the oath, but is mere description and recital preceding the acknowledgment (p. 7.) The statement in his "declaration" (p. 8), — which is not under oath — that he is "of the legal age to enlist," was true, for he was above the minimum legal age of sixteen.

The recruit's youth, and the common experience that minors habitually represent themselves as of age, should go at least as far to put the officers on their inquiry as his oath should to put them from it. They would only have to write to the clerk of the town where he represented himself as born, to ascertain the truth or falsity of his statement, — a precaution which should always be taken. The very existence of such specific legal provisions to prevent the enlistment of minors and the stringent penalties upon officers for violating them (Rev. Stat., Sect. 1342, Art. 3), call for inquiry on their part whenever a youth applies for enlistment. By making no inquiry, the officers show themselves content with protecting themselves personally from the penalty of the law without taking the simplest steps to protect the public service or the rights of private individuals.

The Doctrine of "de Facto" Soldier.

Second. — His remaining in the service twenty days does not estop him. He did not become in twenty days so *de facto* a soldier as to be capable of the military offence of desertion, and amenable to trial and imprisonment by court-martial therefor.

It is obvious that the *de facto* doctrine cannot be sustained in this

case under the legal head of ratification, for an infant's contract of enlistment can, as we have seen, be ratified only after his majority (State *v.* Dimick, *ubi supra*); nor of estoppel, for an infant can avoid his contract at any time before, or within a reasonable time after, his majority, and is not estopped by part performance.

The *de facto* argument proceeds from the supposed extreme case of a minor actually at the post of military duty in time of war, and deserting in the presence of the enemy, and holds that such a one — though illegally enlisted — should be subjected to court-martial. This idea appears — even in the extreme case — to have more feeling than reason in it. Confessedly the minor could, even in the same extreme case, petition the courts for discharge on habeas corpus; and if he is thus legally entitled to his liberty, it is hard to see how he can either forfeit it, or be legally arrested and be held for further service, if he take it by his own act. If he is originally legally entitled to his liberty, how does the court-martial get any jurisdiction of his person to begin with? Moreover, if he is entitled to his liberty he could not be held for military service for the remainder of his alleged term of enlistment, after the expiration of his period of imprisonment by the court-martial; and if he cannot be held for military service after the expiration of his sentence the government is placed in the absurd and self-contradictory position of supporting him through a term of imprisonment on the ground that he is a soldier, and letting him go at the end of it on the ground that he is not a soldier. The moment we depart from the solid ground of voluntary legal enlistment we are all at sea, and the danger to which we thereby expose personal liberty at the hands of military officers far outweighs, at least in time of peace, the danger to military discipline from allowing a minor to take for himself that liberty to which he is legally entitled. Voluntary enlistment being a contract, the law of contract must be applied in construing the statutes and determining the rights of individuals, and not doctrines derived from feudal knight-service or compulsory enrolment by conscription. If minors or other recruits are to be denied their legal right as voluntary contractors under specific statutes, it must be done directly by so

amending those statutes as to give the government absolute rights to their persons irrespective of age, as we have seen was done in 1814–15, not indirectly by judicial legislation invoking doctrines foreign to a permissive statute like that now under consideration.

Morrissey appears to have taken the earliest opportunity to regain his liberty, and was at most only a raw cavalry-recruit on "drill duty" at a "recruiting and forwarding station" near a large city, in time of peace and with no enemy near. He was drilling preparatory to future military service, but was not yet qualified for such service; being a sailor by occupation (p. 7) he probably could not yet sit a horse at a trot, and had not yet even been assigned to a regiment. Even if the *de facto* doctrine is good law he does not, on these facts, come within it. It was only twenty days since his alleged enlistment, and part of that time was spent in being transported from the recruiting rendezvous at Washington to the recruiting and forwarding depot of Jefferson Barracks, near St. Louis. His act in departing from the barracks before he had received pay had nothing like the same moral turpitude which would have been displayed by him if he had notified his officers on the frontier, in the presence of the enemy, that he declined to serve longer, and was going to ask the courts for his discharge on habeas corpus: yet in the last-mentioned case he would confessedly have done only what he had an undoubted right to do. (*Re* McLave, 8 Blatch., 67.) There may be a moral baseness which deserves reprobation in *foro conscientiæ* in a minor's departing from the barracks without leave, but if the officers had no right to detain him against his will it is hard to see why he was legally bound to ask their leave to depart.

Judge Thayer, in the court below, cites no authority for the *de facto* doctrine, except an old case in 12 Johnson, 67, Wilbur *v.* Grace, arising during the war of 1812, from which he quotes. The facts of that case are so much stronger against the minor than those in the case at bar, that it is hardly in point as a precedent. The authority of that case is, morever, weakened by the fact that the court was divided, and that the dissenting opinion of Senator Radcliff is abler

and better reasoned than that of the majority delivered by Senator Sandford. It is still further weakened by the fact that the court below — the Supreme Court of New York, with Chancellor Kent, then Chief Justice, at its head — decided unanimously the other way, to wit: — that as the minor was not legally a soldier he could not be held, and that his assertion of his personal rights by departure without leave, *even from actual service in the field in time of war*, did not forfeit those rights. It may well be questioned whether at this day the authority of Kent alone — to say nothing of his eminent associates and of the dissenting Senators in the Appellate Court — should not outweigh Senator Sandford and his co-Senators.

The *de facto* doctrine has been apparently adopted by some Federal judges (See Cosenow's Case, 37 Fed. Rep., 668, and cases cited) and repudiated by others (See Chapman's Case, 37 Fed. Rep., 327, and cases cited). It at least cannot be said to be established by authority even in extreme cases, and, on the contrary, the weight of authority seems to be against it. In every case where it has been sustained, the recruit had been in the service much longer at the time of desertion than Morrisssy had and over at least one monthly pay-day. Thus in Cosenow's Case he had been in the service seven weeks when he deserted, and at the time of instituting habeas corpus proceedings had already been tried and condemned by the court-martial; in U. S. *v.* Gibbon, 24 Fed. Rep. 135, 19 months; in Hearn's Case, 32 Fed. Rep., 141, a year; in Wall's Case, 8 Fed. Rep., 2 years and 2 months; in Davidson's Case, 21 Fed. Rep., a year and 7 months; in Spencer's Case, 40 Fed. Rep., 149, 2 years and 9 months, and of age 6 months; in Dohrendorf's Case, 40 Fed. Rep., 148, 3 years, and of age 2 years 6 months; in Kaufman's Case, 41 Fed. Rep., 876, 2 years, and of age nearly 2 years; in Beswick's case, 25 How., Pr., 147, 13 months, in 1861-2, in Virginia; in Menzes *v.* Camoe, 1 S. & R., 87, the parents gave a written consent a few days after the enlistment and before the infant had repudiated the contract which was properly enough held to be a sufficient compliance with statutory requirements. In Cox *v.* Gee, 2 Winston, N. C., 131, the petitioner was a legally enlisted soldier, with no disqualifications in the Confederate service in

the field, and was awaiting trial by court-martial for murder and larceny. In no case where that doctrine has been sustained has the time been so short as 20 days, and the "service" so slight as mere recruit-drilling at a recruiting depot. In Ferrin's Case (3 Benedict, 442), where the recruit had been only 20 days in the service, the case does not rest on *de facto* soldiership, for the petitioner — an adult — was legally a soldier, there being no statute or common law to prevent the enlistment of a married man of adult age, — only a directory army regulation addressed to recruiting officers.

On the other hand, in the latest and most authoritative case where the *de facto* idea is repudiated (Chapman's Case, 37 Fed. Rep., 327, 329), the period "was about two months," and the minor was held entitled to his discharge, though three times as long a period had elapsed between his enlistment and his departure without leave as had elapsed in our case; and upon a very careful and elaborate discussion of the question and examination of the authorities, neither the minor's oath of age, his two months' service (and of course receipt of pay), nor his departure without leave, were held a bar to his maintaining a petition for habeas corpus in his own name.

The *de facto* doctrine is not supported, even by the judges who announce it, except on the ground of the alleged "danger" of allowing minors to assert their rights by desertion from actual service.

Article of War, No. 47.

It is true that Judge Brown, in Cosenow's Case — struggling with the legal dilemma of how a man can be a soldier though not a soldier — seeks to defend the doctrine on the ground that the word "enlistment" in the 47th Article of War (Rev. Stat., Sect. 1342, Art. 47), has a narrower meaning than in Sect. 1117, and is complied with by a formal enlistment, however illegal. But there is nothing whatever to indicate that the word has a different meaning in the two sections. On the contrary, the use of the word "duly" in Art. 47 would seem to indicate that "enlisted" was used in its full legal

sense, and the natural presumption, of course, is that it was so used. Such uncertainty in the law is certainly not to be presumed, especially in a careful general revision of the statutes made at one time. For the purpose of legal interpretation the word can have but one sense, and that its full legal sense, indicating the complete change of legal status from the civil to the military. (See Gray, J., in Tyler *v.* Pomeroy, 8 Allen, 480, 485–6.)

If the expression "duly enlisted" had been intended to include invalid enlistments — like those of minors without consent of parents — there would have been no need of adding "having received pay" as an alternative; all possible cases would have been covered by such a broad use of the word "enlist," and "receiving pay" would not have been added, for pay would of course be given only where there was at least a formal or *prima facie* enlistment, and such case would be covered by the supposed broad use of "enlist." The alternative of "receiving pay" can, therefore, have been added only to cover the cases not legally, or "duly" enlisted; — such as those of minors without consent of parents — in other words because the phrase "duly enlisted" was used in the strict legal sense and would not by itself include such cases even when pay had been received. "It would seem that in this article (47) the reception of pay is treated as the equivalent of a due enlistment."

Hoffman, J., in McVey's Case, 23 Fed. Rep., 878, 879.

If Article 47 is intended to give the government power to hold for court-martial some men whom it cannot hold for military service, — to wit, men who, though not legally enlisted, have received pay, — it must be construed strictly, and not stretched to include men who, like Morrissey, have neither been legally enlisted nor received pay. Such an extraordinary invasion, not to say destruction, of the right of personal liberty, — a doctrine which would hold Morrissey for "any punishment, excepting death, which a court-martial may direct" (Art. 47), though he had repudiated his invalid contract by departing without leave two days, one day, or an hour, after entering into it on August 23, 1883, as well as on the 20th, or the 19th,

or any intervening day, is too monstrous for serious consideration, and will not be wrought by mere intendment or construction of words which do not naturally and necessarily call for it. Article 47 must be construed with Sect. 1117, and "enlist" means the same in the two places. It would be absurd to so construe the Statutes as to establish one test for the government's right to hold a man for military service, and another for its right to hold him for trial for desertion. A distinction which would make a man a deserter though not a soldier and put the government to the expense of court-martial and imprisonment of a man whom it could not afterwards hold for military service, cannot have been intended by Congress, and cannot be read into the Statutes except by a *tour de force* of judicial legislation in which it is only too plain that some of the inferior Federal judges have indulged, but which we ask this Court not to follow.

A rule which would reconcile all the authorities, and is fairly deducible from them, and which would protect somewhat the liberty of the individual, would be this: —

"In order to render an originally invalid enlistment valid upon habeas corpus the recruit must have been at least one month in the service so as to have received one month's pay at the time when he repudiates the contract by departing without leave or otherwise."

This would conform to the language of Art. 47, and would sufficiently protect the public service.

The new army regulation, No. 908, adopted Oct. 7, 1889, allows six days for any recruit to repudiate a wholly valid and legal enlistment; thirty days and the receipt of the first instalment of pay is the very least that a recruit should have whose enlistment is not valid.

The "Danger" Argument.

The gist of the *de facto* argument, however, is the alleged "danger" of the legal or *de jure* doctrine to military discipline.

Thus Judge Thayer said in the court below: "It is too *dangerous* to be tolerated. It tends to subvert military discipline;" and in Cosenow's case Judge Brown says, "We are not prepared to

adopt so *dangerous* a doctrine. Carried to its legitimate extent it would authorize any recruit upon the eve of an important battle or after the commission of any military offence to abandon his colors perhaps in the very face of the enemy, and the officer who should order his arrest would be liable as a trespasser."

If it is sound to thus reason from the extreme case in time of war so as to include a case like Morrissey's arising in time of peace, it must also include the case of a minor, on the day or moment after he completes his so-called enlistment, and the plain provisions of statute law are simply nullified and abrogated. In other words, when the *de facto* doctrine begins the law ceases, and that doctrine can be sustained only when the law is in abeyance, — as in time of war, when the habeas corpus is suspended and the maxim *inter arma silent leges* is in force. It has no place under a reign of law in time of peace, but only when military discipline is paramount and supreme, and civil personal liberty is subordinated to the immediate public necessity, and all are drafted into the service of the state for its preservation from a public enemy. As a doctrine of law in time of peace it cannot be so defined as to include Morrissey's case without destroying every safeguard whatever for a minor's personal liberty. If he could be held on the twentieth day, he could on the fifteenth, or the fifth, or the first, or on the very day and hour of his so-called enlistment, and Sect. 1117 would mean absolutely nothing. The maintenance of the law in its strictness may be "dangerous to military discipline," but its evasion and nullification by an elusive *de facto* doctrine is fraught with a far greater danger to the individual, the parent, the family, and society. That danger has been forcibly and eloquently described by a great magistrate and jurist. In Commonwealth *v.* Downes, 24 Pick., 227, 230, Chief Justice Shaw says: "If at the sound of the drum and fife, and the display of the flag of the recruiting officer, all the boys of a city or village, of whatever age could quit the parental roof, and without the consent and against the remonstrance of their parents and guardians, could enlist for the navy and march off, and such a proceeding were sanctioned by law in time of peace, or when no extraordinary

exigency exists, it would lead to a state of society very much like anarchy." The danger thus depicted is only slightly diminished by limiting it to boys above sixteen. It is above that age that the passions and the spirit of adventure are strongest.

Does the danger of occasionally losing a homesick boy from the recruiting barracks of an army of 25,000 men in a country which has a population of rising 60,000,000 to select its handful of soldiers from, so outweigh in time of peace the danger depicted by Chief Justice Shaw that the courts will strain, if not ignore, the plain provisions of the written law to meet it? What becomes of the right of personal liberty of a minor who once by any contingency gets into the actual *de facto* custody of a recruiting officer and signs an enlistment paper?

No amount of supposed "danger" can justify the courts in disregarding the written law. If the "danger" of the present law to military discipline is so great and so paramount, it may be proper for Congress to amend the statutes, as was done in 1814–15, but that is the only proper way to meet the emergency. In the meantime the judicial department is bound to assume that there are able-bodied men enough in the land between twenty-one and thirty-five, and minors above sixteen the consent of whose parents can be obtained, to protect the country from foreign and domestic foes until Congress can act in the premises.

The only true foundation for the *de facto* doctrine and its true limit are well stated by a jurist who has been referred to by the court in U. S. *v.* Wright, 5 Phil., 295, as "not only an able and learned judge, but a statesman of national reputation, whose long and brilliant career in the House of Representatives made him familiar with the acts of the Legislature." In Commonwealth *v.* Fox, 7 Barr., 340, Coulter, J., says: —

"In the presence of an enemy or in an enemy's country, even camp-followers would probably be amenable to martial law; for if they were not the safety of the army might be somewhat jeoparded by their desertion to the enemy. It could only be in this light that a person unlawfully enlisted and held without authority of law could

be amenable for military punishment. But this (viz. : a minor deserting in time of peace) is not a case of that kind."

THE LEGAL EFFECT OF DEPARTING WITHOUT LEAVE.

Third. — His departure from the barracks without leave did not deprive him of his right to be discharged on *habeas corpus*.

The act is certainly not inconsistent with his claim of illegal enlistment, or with his petition for discharge, but, on the contrary, the most natural and unmistakable act in disaffirmance or avoidance of his contract that he could do.

U. S. *v.* Hanchett, 18 Fed. Rep., 26, 27, bottom.
U. S. *v.* Wright, 5 Phil., 296, 298.
Dew's Case 25, Law Reporter, 538, 540.
McNulty's Case, 2 Lowell, 270.

"A minor may at any time avoid his contract, and for this reason this court refuses to return minors held for desertion, when, on habeas corpus, they sue to be discharged from custody. Desertion is of itself evidence of an intent to avoid or annul the contract." (Merrick, J., in Dew's Case 25 Law Reporter, 540.) (In Dew's Case the minor was remanded because the charge against him was not desertion, but mutiny, and the same reason seems to have decided Graham's Case, 8 Jones (N.C.), 416, though it does not appear what exact offence the violation of the order was.)

"There can be no criminal desertion if the enlistment was illegal. It was declaration, merely, of an intention not to be bound; a disclaimer of the contract, which, under the Act of Congress, he had a right to make in the absence of the consent of his parent or guardian." (McCandless, J., in U. S. *v.* Wright, 5 Phil., 296, 298.)

"I do not think that the mere fact that this relator, so soon after his muster into service, and before he had been assigned to any military duty, left the recruiting station and did not return thereto, can be considered as a criminal desertion. If he had deserted after being assigned to duty, and in the face of the enemy, or under any

circumstances which endangered his command, a different question might be presented; but the desertion here alleged should, I think, be construed as a mere disaffirmance of his contract of enlistment, made so soon after the enlistment as to relieve it from any element of turpitude." (Blodgett, J., in U. S. *v.* Hanchette, 8 Fed. Rep., 36.)

The argument against this view has been stated as follows: —

"A soldier may be entitled to his discharge, but it does not follow that he is to be his own judge and discharge himself by desertion" (Wilbur *v.* Grace, *ubi supra*, quoted by Judge Thayer in the court below), or to "take the law into his own hands," and render "the officer who should order his arrest liable as a trespasser." (Brown, J., in Cosenow's Case, *ubi supra.*)

To this we reply (1) that the arresting officer would not be liable as a trespasser, but would be protected by the minor's oath that he was of age, which would estop the latter from recovering damages on the familiar common-law principle that while infancy is a shield, it is not a sword; and that even if the officer were liable, that is no reason for depriving the recruit of his legal rights. (2.) Departing without leave is not "taking the law into his own hands," or setting up "to be his own judge," except in the sense that every deliberate breach or repudiation of an illegal contract is so. He submits all his acts, up to and including the breach of the illegal contract, to the judgment of the court. A recruit has a right to think, and probably he generally does think, that the military officers would not give him leave, if he should ask it, to go where he could employ counsel and appeal to the courts. The officers are not legally bound to give him that leave, especially when they consider him — as they did in this case — legally enlisted, and the recruit is not bound to assume that they would give it. If they should refuse leave, would he be remediless? and, if not, why should he have to ask them?

If Morrissey had a right to his personal liberty on Sept. 13, he had the same right to it on Sept. 14, after his departure; and if on Sept. 14, then on every day up to and including the date of this petition. If he was not legally a soldier on Sept. 13, the govern-

ment had no right to detain him for military service, and if he should depart on that day he would be doing only what he had a right to do by exercising simply the right of personal liberty, which he had never legally parted with, and his departure would not be desertion for which he could be legally tried by court-martial or imprisoned. Whether or not he was, in contemplation of law, a soldier on that day is the very question before this court, and until it is decided that he was a soldier duly enlisted it cannot be said that his departure was wrongful. It is begging the question to argue that his departure was wrongful, and therefore he must be considered and treated as a soldier, and can be held, for it was not wrongful in the legal sense unless he was a soldier at the time, and whether he was or was not a soldier is the very question at issue.

It would be singular if a citizen forfeited his right to personal liberty by asserting it. Such a forfeit — especially of the fundamental right of personal liberty — should only be operated by express legislative enactment prescribing such a forfeiture as a penalty for the extra-legal assertion of the right. Where the courts have argued themselves into such a conclusion, it has been under the influence of the odium and stigma justly attaching to the crime of desertion. This stigma they have — by an obvious *petitio principii* — first attached to the "departure without leave" of an illegally enlisted recruit as if it were a desertion, and then, in consequence of this stigma, visited upon the offender the penalty of the legal offence of desertion as if he had been legally enlisted. We respectfully submit that it is high time for the court of last resort to puncture this fallacy, and to protect the plain legal rights of illegally enlisted persons from the odium and the penalty of an offence of which they are improperly and illegally assumed to be guilty.

II.

The lapse of more than two years after Morrissey's alleged desertion before his arrest is a bar to his trial by court-martial, and that tribunal therefore has no jurisdiction of his person.

U. S. Rev. Stat., Sect. 1342, Art. 103, provides: —

"No person shall be liable to be tried and punished by the general court-martial for any offence which appears to have been committed more than two years before the issuing of the order for such trial unless, by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period."

Five years had elapsed in Morrissey's case. The return does not allege, and it is not to be assumed, that he was out of the United States at all during that period, while our answer expressly alleges that he was not, and the fact is not denied in the pleadings, and was admitted at the hearing.

Under Art. 103, the court-martial has no jurisdiction even to try Morrissey for desertion, much less to convict and punish him. It therefore has no right to the custody of his person, and the civil courts will not allow the imprisonment of a man to await an illegal moot trial by a court which cannot legally try or punish him.

Davidson's Case, 4 Fed. Rep., 507.

"The facts are such that if brought to trial he cannot possibly be found guilty or punished by court-martial for the desertion. But the fact not being disputed that he had resided in the city of New York continuously ever since his desertion, the court-martial has nothing to try, and his arrest for this cause is illegal."

Choate, J., in Davidson's Case, 4 Fed. Rep., 507, 511.

This seems to be a more sensible doctrine than that held in Bogart's Case, 2 Sawyer, 396, 409, and White's Case, 17 Fed. Rep., 723, 725, and Davidson's Case, 21 Fed. Rep., 618. If the court-martial should ignore the two years' limitation and convict the man, he would clearly be entitled to relief; and it is not easy to see why the civil court should not release him before trial when facts appear which show that the court-martial has no legal right to try him. Jurisdiction is power "to hear and determine," and "to try" is to hear and de-

termine; and if a court-martial has no legal right "to try," it is hard to see how it has any jurisdiction over him. The jurisdiction of the civil courts over the person of every citizen, is antecedent and paramount to that of special and subordinate tribunals like courts-martial (*Ex parte* Watkins, 3 Peters, 193, 204); is retained until the person passes clearly within the jurisdiction of the court-martial, and is resumed the moment the person passes out of the court-martial's jurisdiction by expiration of enlistment, discharge, pardon of the offence, or by statutory bar to trial for the same.

In U. S. *v.* Johnson, 3 McLane 89, the court below had already convicted, the defence of limitation had not been set up, and the court was one of general criminal jurisdiction. In Bogart's Case it did not appear as a fact that the deserter had been in the country during the two years, and the court held that the issue of fact was for the court-martial to try.

III.

If this court should be of opinion that the court-martial has jurisdiction to try the petitioner for desertion, he should be remanded with instructions: (1.) That the court-martial shall discharge him on its appearing that for two of the years since Sept. 13, 1883, he had not been out of the United States. (2.) That he is entitled to be discharged from the military service, either (a.) immediately (on the ground of the two years' bar to trial), or (b.) at the expiration of the sentence of the court-martial. Upon the facts appearing on this record, he could not, upon any theory, if remanded, be held either for trial and sentence by court-martial; or for military service for the remainder of his term of enlistment. He is, therefore, entitled to be absolutely discharged from custody by this court on this proceeding.

HENRY W. PUTNAM,
DANIEL NOYES KIRBY,
Of Counsel for Plaintiff in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1890.

FRANK MORRISSEY, PLAINTIFF in error,
vs.
MAJOR DAVID PERRY.
} No. 931.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF FOR THE DEFENDANT IN ERROR.

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BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The case comes into this court on a writ of error to the order of the circuit court for the eastern district of Missouri in a habeas corpus proceeding remanding the petitioner to the custody of the respondent. The facts of the case are as follows:

Frank Morrissey on the 23d day of August, 1883, being then but seventeen years of age, enlisted in the Army of the United States, in the city of Washington, D. C. He upon that day made and signed a declaration of intention to enlist as follows (Rec. p. 8):

> I, Frank Morrissey, desiring to enlist in the Army of the United States for the term of five years, do

declare that I have neither wife or child; that I am of the legal age to enlist, and believe myself to be physically qualified to perform the duties of an able-bodied soldier; and do further declare that I have never been discharged from the United States service (Army or Navy) or any other service on account of disability, or by sentence of either civil or military court, or in any case except with good character and for the reasons given by me to the recruiting officer prior to this enlistment.

Given at Washington, D. C., this 23d day of August, 1883.

FRANK MORRISSEY,

Witness:

STEPHEN H. CURRAN.
Pr'v't G. S., U. S. A.

William Baird, recruiting officer, upon the same day made the following certificate (Rec., p. 8.):

I certify on honor that I have minutely inspected the above-named man, Frank Morrissey, previous to his enlistment, and that he was entirely sober when enlisted; that, to the best of my judgment and belief, he is of lawful age, and that I have accepted and enlisted him into the service of the United States under this contract of enlistment as duly qualified to perform the duties of an able-bodied soldier, and in doing so have strictly observed the regulations which govern the recruiting service. This soldier has gray eyes, brown hair, fair complexion, is 5 feet 9½ inches high.

WM. BAIRD. [SEAL.]
1st Lieut., 6th Cavalry, Recruiting Officer.

The surgeon made the following certificate (Rec., p. 8):

I certify on honor that I have carefully examined the above-named man agreeably to the General Regu-

lations of the Army, and that in my opinion he is free from all bodily defects and mental infirmity which would in any way disqualify him from performing the duties of a soldier.

L. I. RADCLIFFE,
Act'g Ass't Surgeon, U. S.A., Examining Officer.

And then Morrissey took the following oath (Rec., p. 7):

DIST. OF COLUMBIA,
City or town of Washington, ss:

I, Frank Morrissey, born in Billerica, in the State of Massachusetts, age twenty-one years and five months, and by occupation a sailor, do hereby acknowlege to have voluntarily enlisted this twenty-third day of August, 1883, as a soldier in the Army of the United States of America for the period of five years, unless sooner discharged by proper authority, and do also agree to accept from the United States such bounty, pay, rations, and clothing as are or may be established by law; and I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies whomsoever, and and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Rules and Articles of War.

FRANK MORRISSEY. [SEAL.]

Subscribed and duly sworn to before me, this 23d day of August, A. D. 1883.

WM. BAIRD,
1st Lieut. 6th Calvary, Recruiting Officer.

As appears from these papers, Morrissey swore that he was of age, and no written consent was therefore required from his parents. His mother, his only parent living, did not consent to the enlistment. He accepted and drew from

the United States a suit of cavalry uniform and equipments, divers articles of clothing and underwear, and transportation to Jefferson Barracks, St. Louis, where he was ordered to report for duty, and drill as a recruit, and where he arrived in August, 1883. Upon his arrival he was put upon drill duty as a recruit and soldier of the mounted service of the United States Army, drew his rations, arms, equipments, and clothing, as such until the 13th day of September, 1883, when he left the barracks without the consent of the proper officer, and deserted.

He remained away in concealment until after the expiration of the five years from the date of his enlistment, and until February, 1889, when he appeared at a recruiting office in the city of Boston and demanded his discharge from the Army on the ground that he was a minor when he enlisted. He was then placed under arrest by the officer in charge of the recruiting station, on the charge of desertion, and was conveyed to Jefferson Barracks, where he was confined at the time the writ of habeas corpus was served on the respondent. A formal charge of desertion was preferred against Morrissey, and was pending at the time of the service of the writ, and he was then awaiting trial thereon before a court-martial.

ARGUMENT.

The writ of error must be dismissed for want of jurisdiction.

Before discussing the merits of the case, it is deemed proper to call attention to the manner in which this proceeding comes before the court. If jurisdiction is obtained at all, it is by the writ of error issued in the case,

and the question therefore arises whether the Supreme Court has any power under the law to consider a writ of error to an order made in a habeas corpus proceeding. A proceeding on a petition of habeas corpus is a civil proceeding. *Ex parte Tom Tong* (108 U. S., 556); *Ex parte Cota* (110 U. S., 385).

There is no provision by which such a proceeding may be brought by writ of error to this court. Section 691, Revised Statutes, as amended (18 Stats. 316, sec. 3), allowing and providing for an examination by this court upon a writ of error, of all final judgments of any circuit court, only applies to civil actions where the matter in dispute, exclusive of costs, exceeds the sum of $5,000. The only mode of invoking the appellate jurisdiction of this court upon an order made in a habeas corpus proceeding by a circuit court, is either by a certificate of division of opinion under section 693, Revised Statutes; or under the act of Congress of March 3, 1885, (23 Stats., 437) amending section 764, whereby it is provided that "From the final decision of such circuit court an appeal may be taken to the Supreme Court in the cases described in the last clause of the preceding section."

The preceding section is section 763, which defines the cases of habeas corpus, in which appeals may be taken to the circuit court from the decision of any court, justice, or judge inferior to the circuit court; and among the cases defined by section 763 is one which covers the habeas corpus proceeding of Morrissey. An appeal to this court is a different remedy from that by writ of error. Section 765 which, on failure of the Supreme Court to make rules for the *appeals* in habeas corpus cases, allows the

trial judge to direct how they shall be taken, of course gives no power to the trial judge to say that a writ of error may be taken instead of an appeal.

Said Mr. Justice Miller in the case of *In re Neagle* (135 U. S., 42), referring to section 764, as amended by the act of March 3, 1885:

> It will be observed that in both the provisions of the Revised Statutes and of this latter act of Congress the mode of review, whether by the Circuit Court of the judgment of an inferior court, or justice, or judge, or by this court of the judgment of a Circuit Court, the word "appeal," and not "writ of error," is used, and as Congress has always used these words with a clear understanding of what is meant by them, namely, that by a writ of error only questions of law are brought up for review, as in actions at common law, while by an appeal, except when specially provided otherwise, the entire case on both law and facts is to be reconsidered, there seems to be little doubt that, so far as it is essential to a proper decision of this case, the appeal requires us to examine into the evidence brought to sustain or defeat the right of the petitioner to his discharge.

Here is an express ruling that when Congress used the word "appeal" to describe the mode of review of habeas corpus proceedings in the circuit courts by the Supreme Court, it intended to make the procedure analogous to that necessary to review a decree in equity or admiralty. Now, it has frequently been decided by this court, that a writ of error to a decree in equity must be dismissed. *Walker* vs. *Dreville* (12 Wall., 440); *McCullom* vs. *Eager* (2 How., 61). And the same ruling has been made as to the decrees in admiralty. *The San Pedro* (2 Wheat.,

131). It would seem to follow that a writ of error to an order remanding the prisoner in habeas corpus proceedings must be dismissed by this court for want of jurisdiction. If consent can give to this court jurisdiction to treat the writ of error as an appeal, on behalf of the United States such consent is now tendered. Inasmuch, however, as the objection to the jurisdiction is really because of the subject-matter, it is submitted that such consent can not give jurisdiction.

ARGUMENT ON THE MERITS.

Assuming, however, that the court will find that it has jurisdiction to consider the merits of the case, we proceed to discuss the grounds upon which the plaintiff in error claims that the order of the circuit court should be reversed.

No. 47 of the Articles of War provides that—

> Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall in time of war suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment excepting death which a court-martial may direct.

It is understood that the plaintiff in error contends that the court-martial was without jurisdiction to try him:

First, because he was not duly enlisted.

Second, because the statute of limitation for trial and conviction of the offense of desertion had expired.

The claim that there was not a due enlistment of the plaintiff in error rests on two grounds, first, that without

his mother's consent, section 1117 makes the enlistment void; and second, that he had not been assigned to a regular regiment, which was a condition precedent to his due enlistment.

I.

The enlistment was binding on Morrissey without his mother's consent. It was not void, but voidable, and she alone could avoid it.

The restrictions upon the persons to be enlisted in the Army of the United States are contained in the following sections of the Revised Statutes:

> SEC. 1116. Recruits enlisting in the Army must be effective and able-bodied men, and between the ages of sixteen and thirty-five years at the time of their enlistment. This limitation as to age shall not apply to soldiers re-enlisting.
>
> SEC. 1117. No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: *Provided*, That such minor has such parents or guardians entitled to his custody and control.
>
> SEC. 1118. No minor under the age of sixteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of [*any criminal offense*] [a felony] shall be enlisted or mustered into the military service.

The limitation as to age in section 1116 is for the purpose of securing able-bodied and effective men.

This view of section 1116 is borne out by section 11 of

the act of March 16, 1802 (2 Stats., 134), of which it is a revision. *Wyngall* vs. *U. S.* (5 Hill, 16); *Cottingham* vs. *United States* (1 Robinson's Va. Repts., 615).

The purpose of the limitation as to age in section 1118 is shown by the act of July 4, 1864 (13 Stats., sec. 5, p. 380), from which it is derived. That act provides that if any officer of the United States shall enlist or muster into the military service any person under the age of sixteen years, with or without the consent of his parent or guardian, such person shall be immediately discharged upon the payment of all bounties received. The enactment of the condition to be fulfilled by the recruit, namely, that of repaying everything which he has received from the Government, is an evidence that the discharge was provided as a benefit for the youthful recruit and for his protection.

Section 1117 is evidently the completion of the system provided, by which the three parties whose interests are involved in the enlistment of a minor should be protected—the Government by section 1116, the parent by section 1117, and the minor by section 1118.

The effect of the three sections is to give to minors above the age of sixteen years the power to make a binding contract of enlistment with the Government so far as their own rights are concerned.

It has been sometimes attempted to take from enactments similar to sections 1116, 1117, and 1118 the effect which their language, and the necessary implications arising therefrom, would ordinarily have to confer on minors capacity to enlist, by the argument that such a result is in derogation of the common-law disability of minors, and

is therefore not to be permitted if it can be avoided. Little weight is to be attached to this argument because at common law, among the few contracts by which minors could bind themselves were enlistments. Justice Best, in *King* vs. *Rotherfield Greys* (1 Barn. & Cress., 148), says:

> By the general policy of the law of England the parental authority continues until the child attains the age of 21 years, but the same policy also requires that a minor shall be at liberty to contract an engagement to serve the state. When such an engagement is contracted it becomes inconsistent with the duty which he owes to the public that the parental authority should continue.

It was held by the supreme court of Pennsylvania—Chief-Justice Gibson delivering the opinion—that the common-law disability of minors did not affect their contracts of enlistment. Similar rulings have been made by the court of appeals of Virginia in *U. S.* vs. *Blakeney* (3 Gratt., 411), and in *U. S.* vs. *Lipscomb* (4 Gratt., 41). See also *Com.* vs. *Morris* (1 Phil., 381); *Ex parte Roberts* (2 Hall's Amer. Law Journal, 192); *Com.* vs. *Barker* (5 Binn., 426); *Lanahan* vs. *Birge* (30 Conn., 438); *In the matter of Doisinger* (12 O. S., 256); Winthrop's Military Law, 767, 773.

Not only was there no disability of minors to enlist at common law, but it would seem from *King* vs. *Rotherfield Greys* (1 Barn & Cress., 148) that the rights of parents, guardians, and masters had to yield before the Crown. Section 1117 is a benefit, therefore, conferred upon parents and guardians, which they did not enjoy at common law. It follows that the protection accorded to minors and

parents by sections 1117 and 1118 was not even declaratory of the common law, and much less was it in derogation of rights secured thereby.

Coming, now, to consider the three sections in the light of the foregoing, we can not escape the conclusion that with the exception of the limitation imposed in section 1117 it was the intention of Congress that minors over sixteen years of age should have capacity to enlist.

Section 1116 provides for the enlistment of such minors. Section 1118 by forbidding the enlistment of minors under sixteen years of age, impliedly concedes the legality of enlistments above that age. Section 1117, in the proviso that consent of parents or guardians shall be required, provided the minor has such parents or guardian entitled to his custody and control, shows that if a minor is over sixteen years of age and has no parent or guardian, he may contract with the Government for an enlistment.

It is true that a provision in the act of 1813, similar to section 1117, was construed by the supreme judicial court of Massachusetts to mean that when a minor had no parent or guardian he could not be enlisted during minority. *Com.* vs. *Cushing* (11 Mass., 66). The act provided for the enlistment of able-bodied citizens between the ages of eighteen and thirty-five years, and in the same section was the following: "*Provided also*, That no person under age of twenty-one years shall be enlisted by any officer, or held in the service of the United States, without the consent, in writing, of his parent, guardian, or master first had and obtained, if any he have." Just what meaning the court attached to the condition "if any he have" does not appear in the opinion. The only effect which

the words could have, if they had any, was to limit the operation of the proviso to such minors as had parents or guardians. The language will permit no other construction. But the court disposed of this by saying "such a construction is too harsh to be adopted." It is not strange that Mr. Justice Story, in *United States* vs. *Bainbridge* (1 Mason, 73, 86), should say that he had never been able to bring his mind to the construction put upon this proviso by the supreme judicial court of Massachusetts. Chief-Justice Tighlman, in *Commonwealth* vs. *Murray* (4 Binney, 437), construed the proviso to apply only to minors who had parents or guardians. And so did the supreme court of New Jersey, in *State* vs. *Brearly* (1 Southard, 555). With deference to the supreme judicial court of Massachusetts, it would seem that in *Commonwealth* vs. *Cushing* the court's anxiety to protect the fatherless minors made it blind to the necessary meaning of words. Section 1117 is even plainer, if that is possible, than the act of 1813 in its application to only those minors who have parents or guardians. We repeat the language:

> No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: *Provided*, That such minor has such parents or guardians entitled to his custody and control.

What does the proviso accomplish—what is it for if it does not limit the operation of the principal clause? As a limitation upon the principal clause its only meaning can be, "provided that no such consent shall be required in the case of minors who have no parents or guardians."

If section 1117 were intended for the benefit of the minor, it is difficult to see why the proviso should have been inserted. There is no public policy which requires the law to take less care of minors without parents and guardians, than of those who have them. Quite the contrary. If the section, therefore, were for the benefit o. minors, Congress would have left out the proviso, so that those without parents and guardians, could not be enlisted at all.

These considerations show that section 1117 is to be regarded as solely in the interest and for the benefit of the parents. The effect of the section must be held, therefore, to be, not that an enlistment without the parents' consent is void, but that it is binding on the minor, and voidable only on the application of the parent, in whose interest and for whose benefit the section was passed. This is the construction put upon the section in well-considered opinions in decided cases by State courts, and the various circuit and district courts of the United States.

In the law of 1813, the consent of the master was necessary if the minor recruit had any. The supreme court of New Jersey decided that the enlistment of a minor without his master's consent was voidable, and that only by the master. *State* vs. *Brearly* (2 Southard, 555, 562, 563).

The language of Judge Southard we quote at length:

> The right of *Isha Davidson* to a discharge depends upon the proper construction of the acts of Congress fixing and regulating the military peace establishment of the *United States*. They provide for the enlistment of persons between the ages of eighteen and thirty-five, and 5 feet 6 inches high; but the regulation as to height and age is not to extend to musi-

cians, nor to those soldiers who re-enlist into the service. And "persons under the age of twenty-one years shall be enlisted or held in the service without the consent of his parent, guardian or master, first had and obtained, if any he have." In the construction of these provisions we must not lose sight of three ideas. (1) That the power to raise armies has been expressly granted to Congress. They have full and entire control over it. What they enact therefore, on that subject, is to be liberally construed. (2) We are not to regard the employment or profession of a soldier as unprofitable or dishonorable, or in any way injurious to the citizen. Whatever may be our private feelings when looking into an act of Congress making provision for the creation and support of an army, we are not permitted to regard it in an unfriendly or unfavorable light. So far as relates to the import of the laws and the objects of the Government, it is to be esteemed both a profitable and reputable profession. No inference, therefore, is to be made in favor of the discharge of an infant because the enlistment is against him and not for his benefit. (3) The provisions of the law authorize the enlistment for musicians of persons under eighteen years. There is but one form of enlistment ever provided or used under the laws or the Rules and Articles of War; and as persons are enlisted under eighteen for musicians, and all are enlisted under the same form, it must be shown that the object here was not to make him a musician. We do not presume and infer this. It must be proved. But we are in this case left without information upon the point.

The result of these ideas is that an officer may enlist a person under eighteen, and the enlistment is not void, as against law and the interest of the infant;

it is voidable only, and that by those who have a right to complain. He may be enlisted, but he cannot be *held* after it is shown that some one has a right to complain of his detention.

The persons whose consent is pointed out as necessary are the parent, the guardian, or the master. But is the consent of all necessary? Certainly not, if the ideas before suggested, or the phraseology of the law be well considered. These persons are named in the disjunctive; the business is regarded as honorable; the only thing which any one is considered as losing is the *service* of the person enlisted. The person entitled to that is the only one whose consent is to be obtained. The want of the master's consent therefore, where there is a master who claims the service, is the only one which can avoid the enlistment. He is the only person who can claim the discharge. By whom then can the release of *Isha Davidson* be demanded? Not by himself. So far as he can he has more than once consented, and as far as I perceive even now consents; and in no respect does he suffer wrong. By his parents? He is the child of the public. I do not know that he has parents living. If he have, they long since gave up all control over him. By the guardians? They have discharged their duty in disposing of and binding him, and they lose nothing by his change of situation. By the master? He was entitled to the service; his consent ought to have been obtained; and not having been, the enlistment was voidable if he demanded his servant. But he alone can make the demand; he alone can avoid the enlistment.

In U. S. vs. *Bainbridge* (1 Mason, 73), Mr. Justice Story, in referring to the proviso of the act of January 20, 1813, ch. 154, and the repeal of it by the act of Decem-

ber 10, 1814, ch. 10, shows his opinion of the purpose of the proviso in his remark (page 86) :

> This course of legislation manifestly shows that whenever the rights of parents were intended to be saved a special proviso was uniformly introduced for that purpose.

In the case of *In re Davison* (21 Fed. Rep., 618)—before Circuit Judge Wallace—petitioner enlisted when he was nineteen years of age without the consent of his mother. He deserted after two years of service. It was held that he was bound by his contract; that the parents only could assert its invalidity.

In *Menzes* vs. *Camac* (1 S. & R., 87), a similar ruling was made by the supreme court of Pennsylvania.

In the case of the *United States* v. *Gibbon* (24 Fed. Rep., 135), an enlistment of a boy over eighteen years of age without the consent of his guardian was held to be binding on him, and only voidable on the application of his guardian.

In the case of *In re Hearn* (32 Fed. Rpt., 141) it was held that a minor over sixteen years enlisting without the consent of his parents could not avoid the enlistment, but that such enlistment could only be avoided by his parents.

In the case of *In re Cosenow* (37 Fed. Rpt., 68) it was held by Judge Brown, United States judge for Michigan, that a minor over sixteen years of age who had enlisted could only be discharged at the request of his parents.

In the case of the *U. S.* vs. *Hanchett* (18 Fed. Rep., 26) Judge Blodgett took the view that section 1117 rendered an enlistment in violation of its terms absolutely void. He does not seem, however, to have considered the argu-

ments made above, whose validity is sustained by the foregoing cases, and it is not too much to say that the whole opinon is opposed to the general current of authority. (Winthrop's Military Law, vol. 1, 779, note.)

Many cases are frequently cited to show that an enlistment is absolutely void if in violation of section 1117, or similar provisions in force before the Revised Statutes, from which it follows that the minor can complain as well as the parent. It will be found on examination that these are generally cases of applications for release made by the parent or guardian, who had not given his consent. In such case a release must of course be granted, and it is immaterial whether the enlistment is voidable or void. No *obiter dicta* of judges are so untrustworthy as those in which the judge gives an unnecessary opinion upon the question whether a contract is void or voidable. See *U. S.* vs. *Anderson* (1 Cooke, 143); *Com.* vs. *Harrison* (11 Mass., 64); *Lewis's case* (1 Car. Law Repository, 53); *Keeler's case* (Hempstead, 306); *Com.* vs. *Fox* (7 Barr, 336); *Kimball's case* (9 Law Rep., 500); *U. S.* vs. *Wright* (5 Phil., 298); *In re Andrews* (1 Hask., 87); *In re Baker* (32 Fed. Rep., 30); *Com.* vs. *Blake* (8 Phil., 523); *In re Von Dieselskie* (5 Mackey, 485); *In re McDonald* (1 Lowell, 100). All these were cases where the application was by the parent or guardian and in which a decision that the enlistment was void rather that voidable or that it was voidable by the minor, was wholly unnecessary. In *Ex parte Mason* (1 Murphy, N. C., 336); *Shorner's case* (2 Car. Law Rep., 55); *Com.* vs. *Callan* (6 Binn., 255); and in *Carleton's case* (7 Cowen 471), it does not

appear on whose application the release was granted. They can therefore, throw little light on the correctness of the distinction we are seeking to make. The only direct adjudications opposed to the authorities cited to support the proposition that enlistments in violation of section 1117 are voidable only by the parents are *U. S.* vs. *Hanchett* (18 Fed. Rep., 26); *In re Chapman* (37 Fed. Rep., 327); and *In re McNulty* 2 Lowell, 270.

In the case at bar no application was ever made by the mother of Morrissey for his release. It follows from what has been said that if he were duly enlisted in other respects, the fact that his mother did not consent to his enlistment, did not deprive the court-martial of jurisdiction over his offense.

II.

Morrissey was estopped to avoid his contract of enlistment.

The discussion of sections 1116, 1117, and 1118 and their effect is sufficient to show that with reference to enlistments, a minor over sixteen years of age is *sui juris*, so far, at least, as his own rights are concerned. Therefore, even if he would be otherwise entitled to repudiate his contract, on the ground that it was in violation of section 1117, he is estopped to do so in the present case by his false representation that he was over twenty-one years of age when he enlisted. On the face of that representation he was enlisted by the Government, and was furnished food, clothing, and transportation. A man can not be heard in a court of equity to deny a statement which he has deliberately made for the purpose of inducing action by another,

and on the faith of which that other has changed his position.

While this is not a proceeding in equity, it is a civil proceeding by which the recruit seeks a remedy ordinarily granted by a court of equity, namely, the rescission of a contract; and it is not seen why, in administering what is substantially an equitable remedy, the court should not follow equitable principles. This view has been taken by a number of judges. See *In re Cozenow* (37 Fed. Rep., 68, and cases cited); *U. S.* v. *Gibbon* (24 Fed. Rep., 135); *In re McVey* (23 Fed. Rep., 878); *In re Beswick* (25 How., pars. 149, 152.)

III.

Even if Morrissey could have avoided the contract, he did not do so, and it remains binding.

Even if Morrissey could have avoided the contract after his enlistment, he could only do it by formal notification to the authorities or by habeas corpus proceedings. Until so avoided, the enlistment gave the court-martial jurisdiction over him and his acts. It would subvert all military discipline if any one who was entitled to demand his discharge from an enlistment could discharge himself, without notifying the authorities of his intention and the ground upon which a discharge should be granted him. In this case Morrissey left without notice—without bringing to the attention of the authorities the truth with respect to his age. The public considerations which require that a contract of enlistment should not be avoided summarily and without notice are obvious; but even if this were an ordinary

contract, such conduct would not contain the necessary elements of a lawful rescission. The party rescinding is required to bring to the attention of the other distinctly his intention to rescind it (Wald's Pollock on Contracts, 508). Here, so far as the Government officers could know, from Morrissey's statement as to his age, there was no ground for rescission. His leaving without notice, therefore, could only be construed by them into a deliberate breach of the contract—a desertion, and not a claim to rescind. After committing the crime of desertion it was too late to avoid the lawful punishment by repudiating the obligation which he had violated.

The authorities upon this point are overwhelming.

In the case of *In re Beswick* (25 How. Prac. Repts., 149) it was held that where a recruit had enlisted without the consent of his parents, so that they might have applied for his discharge on that ground, nevertheless, where the minor deserted, and charges for desertion had been preferred against him, and he was under arrest awaiting action of the court-martial, habeas corpus even by the parents would not lie for his discharge until the sentence had been executed.

In the case of *Ex parte Anderson* (16 Iowa, 595), on a petition of the father for habeas corpus Judge Dillon refused to discharge a minor son who had enlisted without the father's consent and was held by a military court for trial for desertion.

In the case of *In re Wall* (8 Fed. Rep., 85), the petitioner was held for trial by court-martial for desertion and sought to be released on habeas corpus in the circuit court, on the ground that he had enlisted when he was under

eighteen years of age. It was held by Circuit Judge Lowell that the contract of enlistment was voidable, not void, and that inasmuch as he had deserted without duly avoiding his contract, he was subject to trial by court-martial and could not be discharged from military custody.

In re Zimmermann (30 Fed. Rep. 176), it was held by Circuit Judge Sawyer that civil courts have no jurisdiction to discharge a minor who enlisted in violation of section 1117, R. S., and who is in custody, awaiting a trial, ordered to take place before a court-martial, upon a charge of desertion.

In the case of *In re Spencer* (40 Fed. Rep., 149), the court held that the enlistment of a minor in the military service of the United States, was voidable only, and not void; that a court-martial had jurisdiction to try him for desertion, and that its finding could not be reviewed by the civil courts.

In the case of *In re Kaufman* (41 Fed. Rep., 876), Judge Bond, circuit judge, refused, on application of the parent, to discharge on habeas corpus a minor who had enlisted without his father's consent, falsely stating that he was of age, the minor being held at the time of the application for trial before a court-martial as a deserter.

See also *Wilbur* v. *Grace* (12 Johns. Reps., 68); *In re Davison* (21 Fed. Rep., 618); *Menzes* v. *Camac* (1 S. & R., 87); *In re Cozenow* (37 Fed. Rep., 68); *Com.* v. *Gamble* (11 S. & R., 93—decision by Chief-Justice Gibson); *In re Francis Dew* (25 Law Reporter, 538); *McConologue's Case* (107 Mass., 154; *In re Dohrendorf, et al.* (40 Fed. Rep., 148); *In the matter of Graham* (Jones (N. C.) Law 416).

IV.

Morrissey was a duly enlisted soldier.

Having shown, as it is hoped, that the jurisdiction of the court-martial was not ousted by the failure of Morrissey's mother to consent to his enlistment, we come now to another ground upon which it is urged that he was not duly enlisted, and so was not subject to a military court. It is said that, because when he deserted he had not been assigned to a regular regiment, he was not a soldier.

In another brief filed at the same time with this, in the case of *U. S.* v. *Grimley*, No. 761 on the docket of this court, a very full discussion has been had as to what constitutes a due enlistment in the Army under the laws of the United States. The argument there given at length will only be sketched here to show that when a man has taken the oath of allegiance prescribed by article 2 of section 1342, he has changed his status from that of a civilian to that of a soldier; that he has then become subject to military discipline and to trial by court-martial.

The history of the English law upon the subject of enlistment, from which our present system is directly derived, shows that after a man had made the contract of enlistment with a recruiting officer, it was required that he should have at least one day before he went to a civil magistrate, and took the oath of allegiance. Before taking the oath, he might withdraw from his contract of enlistment. This oath before a civil magistrate, after enlistment with a military officer, was preserved in the American

system of enlistment in force during the war of the revolution. Subsequently, it was provided that the oath might be taken before the judge advocate, and, finally, before any commissioned officer. *Tyler* vs. *Pomeroy*, (8 Allen, 480).

The feature of the law by which an opportunity for deliberation and withdrawal is given between the time of enlistment and the taking of the oath, still remains in the law. By article 2, section 1342, after examination, acceptance, and enlistment, it is required that the Articles of War shall be read to the recruit. By paragraph 766 of the Regulations of 1881, in force when Morrissey enlisted, this time was to be devoted to deliberation by the recruit upon the question whether he should or should not become a soldier. This time for deliberation has been, since the days of William and Mary, the *locus penitentiæ* of the recruit. It would have no significance or purpose unless the act of taking the oath which succeeded it, made the enlistment irrevocable. It was plainly, therefore, the effect of the law that if the oath was taken it was a finality in the enlistment.

The same thing appears from an examination of the present Revised Statutes. Article 2 of section 1342 provides for the reading of the Articles of War between the enlistment and the taking of the oath, and then prescribes the oath. Article 4 says that after a man has been duly sworn he shall not be discharged from the military service without a discharge in writing. Article 4 evidently refers to article 2 (see articles 10 and 11 of act of April 10, 1806, 2 Stat., p. 259, and section 3 of Articles of War, 1776),

and its form might be altered, without changing its meaning, so as to read "after the enlisted man shall have fulfilled the requirements of article 2, he shall not be discharged from the service," etc. This leaves no doubt that when he has taken the oath provided in article 2 he is in the service, from which he is to be discharged only by a writing. If he is in the military service he is a soldier.

That a man becomes a soldier by taking the oath is also shown by the military discipline to which he is subjected after that oath is taken. By the Army Regulations, while he is at the rendezvous, he receives a uniform; he is to be instructed by the recruiting officer, and he is to be sent from there to the depot in charge of a sergeant; when at the depot he is to be mustered, inspected, and paid, exactly as if he were a soldier in a regiment. He is to be drilled in the various tactics by officers assigned to that duty, and is to be furnished with all his equipments. It would be manifestly impossible to carry out these regulations if the recruit was not subject to military discipline. If he is subject to military discipline he is a soldier. If he can be lawfully commanded by a military officer as his superior, he can be tried by a court-martial, for the jurisdiction of the one to give him a command and of the other to try him depends upon the same thing, namely, that he shall have a military status.

To show that the foregoing statements of the condition of the recruit after he has taken the oath are correct, reference is made to paragraphs 776, 777, 778, 779, and 808 to 820, inclusive, of the Army Regulations of 1881.

V.

Morrissey had received pay.

Morrissey had received pay as a soldier, and so was liable to the court-martial, whether he was duly enlisted or not. He had received clothing from the Government, and the issue of clothing to the soldier is payment to him for his services. It is a part of his compensation. As will be seen by reference to section 1302, he is charged upon his pay-account with clothing overdrawn, at an annual estimated value, and is credited in the same way when he has not drawn his full allowance of clothing. Article 47, defining desertion, makes a man subject to trial for the crime if he has received pay from the Government or has been duly enlisted. The receipt of pay dispenses with the necessity for a due enlistment, and gives jurisdiction to the military court.

VI.

Limitation of 103d Article of War is a defense only, and does not go to the jurisdiction of the court-martial.

The limitation of time within which military offenses can be tried, prescribed by article 103 of section 1342, does not go to the jurisdiction of courts-martial. The fact that the limitation has expired is a defense to the prosecution to be considered by the court-martial in the trial of the accused.

A civil court can not anticipate that a military court will disregard the limitation; and even if it does, such

action can not be reviewed or set aside in a civil tribunal. This proposition is so completely established by authorities that it is not necessary to dwell upon it further. *Bogart's case* (2 Sawyer 409, cited with approval in *Smith* v. *Whitney*, 116 U. S. 177); *in re White* (17 Fed. Rep., 723, also cited in *Smith* v. *Whitney*); *in re Davison* (21 Fed. Rep., 618); *in re Zimmerman* (30 Fed. Rep., 176).

It is respectfully submitted that the circuit court had no power to release Morrissey from the military authorities; that his offense and his status were within the jurisdiction of the court-martial, and that the order remanding him to the custody of Maj. David Perry was right and should be affirmed.

WM. H. TAFT,
Solicitor-General.